THE MIXED COURTS OF EGYPT,1875-1949;A STUDY OF THEIR DEVELOPMENT AND OPERATION,AND THEIR INFLUENCE ON POST-WAR EGYPTIAN LAW

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ABSTRACT.

This study starts with an Introduction,describing the historical background of Egypt.Chapter 1,Origins of the Mixed Courts,covers the build up to the reforms of 1875,and Chapter 2 deals with the Structure and Laws of the Mixed Courts,including their organisation,judiciary,and administration,and how the sovereignty of Egypt was affected.Chapter 3,the first of seven chapters dealing with the history of the courts over their lifespan, is on 1875 to 1885,which covers the first important move of the Mixed Courts-upholding the law against the Khedive,thus showing that even the ruler of Egypt was subject to the law. The British Occupation in 1882,and the establishment of the reformed Native Courts in 1883 are also discussed.

1886 to 1895 sees the Mixed Courts in a more active role, assuming jurisdiction over large companies and institutions. The theory of Government Immunity begins to develop,and this appears again in Chapter 5,1896 to 1905,in considering the Dongola Expedition.Taxation,Trademarks,Personal Status and General Jurisprudence are all considered.

Chapter 6,1906 to 1915,introduces further cases on Taxation and Company Law,as well as on the definition of foreigners. The Ist.World War is discussed,as is the arrangement of binding precedent from a plenary session of the Mixed Court of Appeal,to resolve disputes within the Mixed Courts.1916 to 1925 is discussed against the background of rapid political change in Egypt's status,and 1926 to 1937 considers the general work of the Mixed Courts as well as the Salem Claim, a dispute between the USA and Egypt over the Mixed Courts. 1937 was a landmark year,and the Montreux Convention and its effects is considered.

1937 to 1949 sees the closure of the Mixed Courts,the transfer of functions to the new National Courts,and a series of important judgements on the Jurisdictional Immunity of Foreign Armed Forces in Egypt.

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Selected Abbreviations.

ADPIL	Annual Digest of Public International Law.
AJIL	American Journal of International Law.
BLJ	Bulletin de Lĕgislation et de Jurisprudence Egyptiennes(also known as Bollettino di Legislazione e Giurisprudenza Egiziana).See Appendix II.
BO	Bulletin Officiel(Cairo).
BYIL	British Yearbook of International Law.
Clunet	Journal du Droit International Privé.
ESIL	Journal of the Egyptian Society of International Law,Cairo.
FO	Foreign Office Reports at the Public Record Office,Kew.
General Rules	RGJ(q.v.)1875.
GTM	Gazette des Tribunaux Mixtes d'Egypte-Revue Judiciaire Mensuelle.See Appendix II.
ILR	International Law Reports.
JCL	Journal of Comparative Legislation & International Law.
JTM	Journal des Tribunaux Mixtes.
Judicial Rules/ Regulations	ROJ(q.v.)1875.
LE	Egyptian Pound.
LQR	Law Quarterly Review.
MCA	Mixed Court of Appeal(based in Alexandria).
MCA(P)	Plenary Session of Mixed Court of Appeal.
MCC	Mixed Civil Code.
MCCass.	Mixed Court of Cassation(based in Alexandria).
MCom.C	Mixed Commercial Code.
MCCiv.Proc.	Mixed Code of Civil Procedure.
MCCr.I	Mixed Code of Criminal Instruction.
MCd'Assises	Cour d'Assises Mixte.
MPC	Mixed Penal Code.
NPC	Native Penal Code.
PC	Penal Code for both Mixed and Native Courts(1937).
PT	Piastre(100 PT = LE 1).

Rev.Regs.	Règlement d'Organisation Judiciaire(1937).
RGJ	Règlement Général Judiciaire(1875)-(General Rules).
RO	Recueil Officiel des Arrêts de la Cour d'Appel Mixte.
ROJ	Règlement d'Organisation Judiciaire(1875)-(Judicial Rules/Regulations).
SLR	Sudan Law Reports.

INTRODUCTION.

Any study of a legal system in Egypt,which was inaugurated in the late 19th. Century and lasted until the second half of the 20th. Century,would be incomplete without an overview of Egypt's history in the preceding centuries,with particular regard to foreign commercial and political involvement.

At various times over Egypt's long and detailed history events and changes have repeated themselves,in similar and familiar circumstances.Thus in the 7th. and 6th. Centuries BC the Saite Kings made strenuous efforts to encourage Phoenician and Greek merchants to settle and develop external trade.This pattern was to reemerge time and time again, starting in the period of Persian rule in the 5th. Century BC.The present relevance of such events is,however,simply to indicate a trend.It is much further on in Egypt's history that we must look to consider which events shaped the legal, political and commercial character of the country to produce the Mixed Courts as a practical necessity.

Egypt was one of the first Christian countries,St.Mark converting the people in the Ist. Century AD,and by the 4th. Century AD the Byzantine Empire was in control-a state of affairs not,in the end,popular with the Egyptians.In AD 640 the Arab invasion took place and Amr ibn el-As,Commander of the Forces,captured Old Cairo(then known as Babylon),founded Fustat,and accepted the surrender of Alexandria in a gradual campaign over two years.Alexandria especially accepted Amr as a liberator from what had become Byzantine oppression,and the gradual Islamisation of the Egyptians began.

Even at this stage the foreign and Christian communities were accorded a considerable degree of freedom.Following the Islamic principle that the Sharia was for believers and not for non-Moslems,the varying jurisdictions of religious and personal status courts were accepted by the Arab rulers as normal,and foreigners and Christians encountered no trouble over their legal systems.

In 661 Egypt was controlled by the Umayyad Caliphate from Damascus.It was part of a large empire which had outposts in China to the East and in North West Africa to the West. Indeed,during Umayyad rule Arab forces were to cross into France from Spain.Thus Egypt was in the centre of moderate cultural and political change.In 706 the Caliphs decreed that Arabic would replace Coptic as Egypt's official language.

The Abbasid dynasty in Baghdad became rulers of Egypt in 750, in succession to the Umayyads.There had been many revolts of the Copts,who were the indigenous Christians at this time, and eventually they were suppressed;as a result most converted to Islam although many remained as a minority Christian group. In 868 the Abbasid governor,Ibn Tulun,established his own dynasty(Tulunids)in Egypt,independent of Baghdad but recognising the Caliphate's overall sovereignty.

The Tulunids,like so many of Egypt's rulers,had territorial ambitions,and suceeded at various times in controlling parts of Syria and Iraq,in exchange for tribute to the Caliph. These foreign actions led to a migration of people and the exchange of ideas,which were part of the great influence of foreigners on Egyptian life throughout history.

The Tulunids lasted until 905,when there was centralised rule from Baghdad until the Ikshidids seized control in 935.Their rule lasted until 969 when the Fatimid Caliphate of North West Africa governed Egypt and established it as the centralised base of a new empire.During their rule modern Cairo(al-Qahirah)was founded,and the Islamic university of Al-Azher was established.

The Fatimids began the process of importing slaves as troops; this practice became a traditional and vital part of military Egypt for many centuries.It is noteworthy that over this period the Christian states of Europe were engaged in Crusades and in 1099 Jerusalem was captured by the Christians.As a result of this European Christian communities were formed in the Levant,and indigenous Christians were given foreign protection.

In 1171 Salah el-Din el-Ayyoubi captured Egypt and converted the country back to the Sunni interpretation of Islam,and away from the Shia path chosen by the Fatimids.Salah el-Din founded the Ayyoubid dynasty which ruled until 1252.From then until 1517 Egypt was ruled independently by the Mamelukes,who were regimented and highly organised military groups,maintaining their control by the constant importation of slaves from Circassia and other Near Eastern and Black Sea states.During Mameluke rule Egypt changed from a country with cultural and political ambitions to one ruled mostly by fear and with force.Although great monuments and buildings were constructed,legal and commercial life came to a stop. The violent,arbitrary and unpredictable rule of the Mameluke Beys led to a reluctance on the part of Europeans to trade with Egypt,despite a concurrent interest in overseas trade from merchants in England,Portugal,France and other countries.

Mameluke rule may be divided into that of the Bahri Mamelukes, 1250-1382,and the Burgi(or Circassian)Mamelukes,1382-1517. Beybars(1422-1438)and Qaitbey(1468-1495),both responsible for many buildings of note in Egypt,were from the latter group.

In 1517 Selim I,known as Selim the Grim,bolstered by his successes in Iraq and Syria,conquered Cairo and established Ottoman rule in Egypt as a Turkish Pashalik;divided into twelve sanjaks ruled by emirs,under the supervision of a Pasha in Cairo.Thus Egypt looked again to Constantinople as the sovereign power,as it had done in Byzantine days.

The Ottoman dynasty was strengthened in its claim to lead the Moslem world by the transfer of the Caliphate from Mohamed Abu Jaffr,the last Abbasid Caliph,to Selim,although some doubt exists as to whether this actually took place. Once he had this,Selim had the legitimate claim to be supreme ruler of Islam.The transfer,together with his recognition by the Sherif of Mecca,which included sending him the keys of the Kaaba,meant that the Ottoman Sultan also became the protector of Islam's Holy Places.The religious approval signified by these actions helped give control of Egypt

through the judges appointed by the qadi al-qudah(judge of judges)also known as the qadi askar(military judge),because these judges interpreted and applied the Sharia in Egypt,and an interpretation and application favourable to the ruler's policies was vital for popular support.

From 1517 to 1805 Egypt was such an integral part of the Ottoman Empire that the real significance of this can only be appreciated by reference to the treaties made by the Ottoman Sultan with foreign powers,known as Capitulations. These are dealt with in the next chapter.It is to be noted in addition to the Capitulations that the Ottomans embarked on a series of military adventures that rivalled those of the Arab dynasties before,and brought many Christian communities under their control.This prepared the way for easy movement of Moslem and non-Moslem Ottoman subjects within the empire,which led to an increase in trade and the propagation of new,often European,ideas and customs.

Selim's son,Suleiman II,known as the Magnificent and the Lawgiver(Qanuni),controlled the empire at its most expansive and powerful,including campaigns in Europe,Hungary,the Balkans and India.After his rule there began a gradual decline,partially stopped under Murad IV,1623-1640,which however accelerated towards the late 18th. Century,and became of grave concern to the European powers in the middle of the 19th. Century.This led the 'Eastern Question' to be a frequent problem for governments in London,Paris, Berlin and Vienna.Ottoman decline also led to unopposed and much greater foreign involvement in Egypt.

With regard to Egypt itself,there were frequent revolts from 1586 to 1711,and rule of the country was centred on different power bases.Clan and family rivalry had a deadly effect on progress,but in the middle 18th. Century interest in Egypt revived amongst the British,and British ships were encouraged to call in to Egyptian ports.The British East India Company,and the British Levant Company,feared this as an encroachment on their respective interests,and succeeded in persuading the British government to oppose any plans for an expansion of British interests.At the same time

French interest grew,both officially and unofficially,but it was not particularly successful because the Ottoman Sultan distrusted French motives.

In 1798 Napoleon,as part of his ambition to expand French influence and decrease that of Britain in the Mediterranean and India,embarked from Toulon and landed in Egypt with a military and scientific expedition.He wanted Egypt as a base from which to expand into the Ottoman empire,then regarded as dangerously near collapse,and he was able to persuade France that his presence in the country would be doubly useful.

France still regarded India as a prize to be captured,and the only sensible overland route to India involved crossing Egypt.The quickest combined transport route was by ship to Alexandria,overland to Suez,and then by ship to India.For all these reasons Napoleon wanted Egypt as a French colony. Nelson defeated the French fleet at Aboukir in August 1798 however,and Napoleon was forced to leave in 1799.The rest of the French expedition had to evacuate in 1801 when a strong British army landed.

In the short period available to them the French had done quite a lot to introduce or magnify modern processes in Egypt.It cannot be said that France turned Egypt into an 18th. or 19th. Century state by the despatch of her scientists and soldiers.The effect was more long term and subtle,but the reestablishment of European contact was significant.Arabic printing presses were set up with Vatican help,and some minor judicial reforms were attempted.The French also introduced harsh taxes on the parts of Egypt that they controlled,and this contributed to their unpopularity.None of the French measures lasted,and when the British forces withdrew in 1803 Egypt returned to much the same situation as before the French invasion.

The effect of continuing Ottoman rule was that new ideas and improvements were subject to official control and natural suspicion.France's brief occupation,albeit unpopular and temporary,had shown the Egyptians that there were

alternatives to the Ottoman way of doing things.The British presence had a similar,if more practical,effect.

In 1805/6 Mohamed Ali,an Albanian officer under Turkish orders,established himself as the Viceroy of Egypt,nominally on behalf of the Ottoman Sultan but effectively,especially after his massacre of the Mamelukes in 1811,as an independent ruler.In 1827 his navy was destroyed at Navarino by a French, British and Russian fleet,and he started looking inwards to Egypt and away from territorial conquests.In 1835 he began an ambitious series of plans to modernise Egypt's irrigation and thus reduce dependence on the annual flooding of the Nile.He did this by a combination of barrages,drains and pumps that regulated and controlled the water flow.At the same time agriculture was expanded,with one million new feddans of land under cultivation,and factories based on cotton and other raw materials were started to provide industrial support for his armed forces.

In an effort to modernise as quickly and efficiently as possible Mohamed Ali sent young Egyptians to France and England to learn trades,as well as encouraging French, English,Lebanese and other Christian foreigners to settle in Egypt and develop the fledgeling export and import trade.Although this modernisation was based on a desire to secure finance and supplies for the military it showed Egypt a new side to foreign involvement,and can be said to have provided an example for Ismail,his grandson,years later. At all times,however,Mohamed Ali's industries were state monopolies and foreigners were not free to pursue their own ambitions unless they coincided with his.Even when foreigners worked with him they found him a harsh feudal overlord who did not accept disagreement lightly.

In 1841 a firman(decree)from the Sublime Porte in Constantinople delineated Egypt's place in the Ottoman Empire,and set out a charter for Egypt,guaranteed by Britain, Austria,Prussia,Russia,and later by France.In exchange for a considerable degree of independence,Egypt was obliged to

assist the Ottoman Empire with military needs,especially troops,and this was to lead to later involvement in the Crimean and Russian wars.It is important to note that Egypt only had to apply Ottoman laws in so far as they 'accorded with the requirements of the locality and the principles of justice'.

Mohamed Ali ruled until 1848,when his son Ibrahim took over briefly.The next ruler of Egypt,in 1849,was Abbas I, who ruled until 1854.At about this time Austria and Russia were seeking a break up of the Ottoman Empire to provide themselves with territory,and the other European powers were determined to prevent that happening.Also,huge numbers of foreigners began to enter Egypt to trade and act in professional or semi-professional capacities.They were,as will be considered in the next chapter,largely immune from local taxes and laws,but their presence suited Egypt's entrepreneurial needs.Abbas was pro-British and did not trust the French.He was followed by Said,1854-1863,who was pro-French and gave permission to de Lesseps,an old friend,for the Suez Canal to be started.In 1858 the Cairo-Suez railway was built, in 1860 Port Said was founded,and in 1863 Suez was provided with piped fresh water.Although Said was pro-French he had a genuine desire to encourage all overseas trade,and he instituted reforms of domestic laws concerning land that greatly assisted the fellahin.

Ismail,1863-1879,son of Ibrahim,during whose reign the Mixed Courts were planned and inaugurated(1875)was a controversial ruler.Opinion about him has not been indifferent,but whatever may have been his faults or qualities,it cannot be denied that immense modernisation work was carried out.The Suez Canal for instance was opened in 1869.Alexandria had grown to be a huge and successful trading city,with a population of nearly 200,000;a quarter of those were estimated to be foreigners, mostly British,French,Italian,Greek,German and Austrian.

By the end of Ismail's reign 1,000 miles of railway had been built,four to five million more feddans of land were in

cultivation,500 miles of telegraph had been installed,430 bridges had been built,together with the construction of 64 sugar mills,8,400 miles of canals,and the Alexandria Harbour and Suez Docks.This was only achieved at the cost of Egypt's foreign debt reaching 98M LE.

In 1876 international financial pressure led to the establishment of the Caisse de la Dette Publique,to regulate Egypt's revenue and channel the money to pay off foreign loans. These loans had been incurred for Ismail's twin goals of a modern Egypt and an African empire,but a large part of the debt had also been incurred to persuade Turkey to alter the Khedivial succession and permit various other reforms, including the Mixed Courts.This price of progress was to be one of the first major issues before the Mixed Courts when the debts came to be repayable.

In June 1879 Ismail was deposed by the Ottoman Sultan on the instigation of the European powers,and he was succeeded by his son Tewfik,1879-1892.The single most important event of this reign was the British Occupation in 1882,overtly to support Tewfik and restore order following the revolt of Orabi and part of the army.From that time on the British Consul was to be the effective ruler of Egypt,with a series of Advisers in key ministries.First treating Egypt as a 'roadside inn' on the way to India,the Occupation soon became an end in itself,leading to major political and legal reforms for Egypt.

The turn of the century and events leading up to the Ist. World War took place during Abbas II Hilmi's reign,1892-1914. On the material side prosperity and trade increased,and major projects were completed,such as the Aswan dam in 1902.This dam was later extended in 1912 to provide even further supplies of water for agriculture and industry.Abbas was pro-Turkish, and on the outbreak of war was felt to be a danger to the Allies.He was therefore deposed by the British and his uncle Hussein Kamal took over from 1914 to 1917.The British then declared a Protectorate over Egypt.

Nominal Ottoman sovereignty was thus exchanged for actual British control,previously only de facto and now de jure also. It should be noted that Britain's protectorate was over Egypt and not of Egypt,and no rights of citizenship or status accrued to the Egyptians.Britain did however guarantee Egypt's independence and safety.The effect of protection on domestic Egypt was only a more obvious British involvement.The system of advisers had already ensured real British rule.

Ahmed Fuad I succeeded his brother in 1917.After the Ist. World War and the Treaty of Lausanne,1924,the Ottoman Empire was dismantled,and he ruled Egypt over a long period of nationalist opposition and demand for change.Fuad declared himself King in 1922,when the British Occupation ended,and Egypt became a completely independent sovereign state.In 1936 the last true King of Egypt,Fuad's son Farouk,succeeded him. This reign saw the transitional period for the Mixed Courts, following the 1937 Montreux conference,and their merger and effective abolition in 1949.In between,the effects of the 2nd.World War on Egypt and the Mediterranean were reflected in numerous cases in the Mixed Courts concerning military immunity from prosecution.

In 1936 the Anglo-Egyptian Treaty had provided for the withdrawal of British troops,which had stayed in Egypt despite independence,to the Canal Zone.When war broke out Egypt permitted these and other troops to be stationed in the rest of the country,subject to negotiation.

In 1952,following the revolution headed by General Neguib, and inspired and led by Gamal Abdul Nasser,Farouk abdicated in favour of his infant son Ahmed Fuad II,and in 1953 the monarchy was finally abolished.Mohamed Ali's family had ruled Egypt in stormy and changing times,when the transition from a relatively backward Ottoman state to fully fledged independence took place.A recurrent theme over much of this work will be the impact of the Mixed Courts on this change, not only as a system applying a fixed collection of codes, but also in the way the jurisprudence of the courts combined

with these codes to establish a true rule of law.This in its turn led to parallel development in other Egyptian legal jurisidctions,such as the Native Courts and the Sharia courts, and eventually paved the way for the Mixed Courts' own dissolution in 1949;by the establishment and consolidation of the rule of law they in fact sowed the seeds for their own end,as they no longer remained a necessary and unique part of the Egyptian system.

The following chapters deal with periods of 10 years,after a discussion of the origins of the Mixed Courts in Chapter 1,and the structure,laws and role in Egypt in Chapter 2.Chapter 3 thus covers the years 1875 to 1885,and each 10 year period is similarly treated,until the years 1925 to 1937 which are dealt with in Chapter 8 because of the Montreux Convention in 1937. Chapter 9 covers the years 1937 to 1949,so as to consider the years leading up to abolition and merger in 1949.A conclusion completes the text of this work.Each chapter is divided into sections,listed in the Table of Contents,and referred to in the Introduction to each chapter.Where applicable footnotes are indicated by numbers in the text,and these may be found at the end of each chapter.The Appendices include a bibliography,and a comparative table of years and volumes of the two most commonly quoted Egyptian law reports.There are also various statistics on finance.

Although this study sometimes refers to laws of various countries which influenced the Mixed Codes(especially in Chapter 2)or the thinking of the judiciary,it is not essentially a comparative study.Nor is it sought to analyse the Mixed Codes themselves except where this assists the main purpose of this work,which is to examine and describe the development and operation of the Mixed Courts from 1875 to 1949,through the cases and the arguments of the judiciary,taking full note of political events and history,together with conclusions drawn from that time span to assess the influence of the Mixed Courts on the theory of Egyptian law.

CHAPTER ONE

ORIGINS OF THE MIXED COURTS OF EGYPT.

Introduction.

This chapter deals with the period before the Mixed Courts began.It is concerned with showing how the various aspects of Turkish sovereignty and foreign treaties affected Egypt's legal system,and with considering how the circumstances of Egypt before 1875 gave rise to the need for the Mixed Courts. The latter part looks at progress towards reform of the old system,and the inauguration of the new courts.

Egypt was,from 1517 to 1914,under the legal sovereignty of the Ottoman Empire.Although this sovereignty was often nominal, especially towards the end of the 19th.Century after the British Occupation of 1882,it had a considerable effect on Egypt.It led to the extension to Egypt of treaties,known as Capitulations[1], between the Ottoman Empire and foreign Christian states,and forced Egypt's leaders,in their negotiations with foreign countries,to keep within limits permitted by the Ottoman rulers in Constantinople.It also gave rise to the enforcement of some Turkish-based laws in Egypt.

The chapter therefore starts with a description of The Capitulations,leading on to Turkish Firmans and Laws.Then follows a look at the Laws & Jurisdiction for Commerce before 1875,leading to the Necessity for the Mixed Courts,Progress to Reform,and The Inauguration.Notes to the text conclude Chapter 1.

The Capitulations.

It is convenient to consider the Capitulations in two ways, from the Islamic and the commercial viewpoints:

a)The Islamic viewpoint-

From the point of view of the Moslem Islam was,and is,a way of life for the community of the faithful and non-moslems,whether foreigners or subjects,were allowed to follow their own laws in internal matters such as personal status.Laws were viewed as essentially religious,and thus religion was to determine which laws generally applied to adherents of that faith[2].It can also be said that non-moslem subjects,known as dhimmi,or,if Jews and Christians, ahl al-kitab(people of the book),were treated as part of the state but allowed their own internal laws.Extending this principle to foreigners who were Christian,it was practical to set out their similar rights in formal treaties[3].

A further consideration is that in Moslem legal systems the idea of the personality of the law is important.Law was applied by virtue of the origin,nationality,religious or tribal affiliation of a person[4];the jus gentium rather than the jus civile.Contrast this with the Western approach which tends towards territoriality.There was therefore nothing strange or objectionable to a Moslem in allowing foreigners to have recourse to their own laws.

b)The Commercial viewpoint-

From a commercial point of view the Ottomans saw trade as essential to economic progress,and reasoned that trading with foreign nations was desirable and advantageous.Foreign merchants were reluctant,however,to reside and work in the Empire unless they were given some guarantees that they would come to no harm.The Capitulations began as a means to set out these guarantees formally[5].

In Turkey itself the Capitulations generally provided for:

1.Freedom of residence and trade;

2.Freedom of religion;

3.Immunity from arbitrary taxation;

4.Attendance by the consul of the accused or the consul's representative in Ottoman criminal courts;
5.Advice to the consul from the authorities before searching a foreigner's domicile.

In Egypt,by marked contrast in points 3 to 5 above,these privileges were:
1.Freedom of residence and trade;
2.Freedom of religion;
3.Immunity from all direct tax;
4.Consular jurisdiction over crimes by their nationals,and consular jurisdiction over civil cases where their national was a defendant;
5.Freedom from domiciliary search unless the consul was present.

The extensions in Egypt had been allowed to develop gradually as custom,and once these rights had been allowed they became entrenched on the basis of precedent,and led to complete judicial chaos and babel.

The principle actor sequitur forum rei meant that any case, criminal or civil,was judged by the defendant's consul according to the defendant's law.Freedom from tax and virtual immunity from domiciliary search because of the reluctance of many consuls to be present when requested by the authorities gave foreigners privileges never contemplated by the original parties to the Capitulations.It must also be remembered that these foreigners were often criminals who readily sought consular protection against the Egyptian authorities[6].

The freedom from taxation was economically dangerous and caused bitter resentment amongst Egyptians,but no improvement could be made without the unanimous agreement of the Capitulatory Powers,and this was difficult to obtain.Any one of them could veto a tax proposal,even if only a few of their nationals lived in Egypt[7].

The Egyptian government thus found itself powerless to tax a wealthy proportion of its residents,unable to enforce criminal laws against a whole section of society,and unable to secure a just solution to its own citizens' disputes with foreigners.

Turkish Firmans[8] and Laws.

At the same time as the rights of foreigners became wider in Egypt than in Turkey, the Ottoman rulers were proceeding gradually to permitting Egypt's rulers a greater degree of independence. This was not a selfless exercise of discretion. Egypt paid heavily in increased tribute for these concessions and Mohamed Ali, in the first of a series of firmans, had to accept restrictions on his ambition to expand an Egyptian empire. This was in 1841, after intervention by Great Britain, Austria, Prussia and Russia to help the Ottoman Sultan keep his empire intact.

In the London Convention of July 15th 1840 Mohamed Ali was restricted to a solely Egyptian sphere of influence. By the Treaty of London in 1841 he was allowed financial freedom within Egypt, but his state monopolies were abolished. Following these international agreements he was granted firmans dated February 13th. 1841 allowing him the hereditary government of Egypt under the Turkish Sultan, and the right to rule the provinces of Nubia, Kordofar and Senaa for life[9].

A firman dated June Ist. 1841 stated that the organic laws of Turkey should be applied in Egypt 'in accordance with the requirements of the locality and the principles of justice'. This was seen to define Egypt's place within the Empire, guaranteed by the four interventionist powers[10].

Clearly not all Turkish laws were suitable for Egypt, and over the years many were not adopted, such as the Ottoman Land Codes 1839 and 1858; Ottoman Penal Code 1840; the Ottoman Civil Code (Majella el-Ahakem el-Adleah) 1870-1877[11]. On the other hand the Ottoman Law of Mines, 1869, was enforced, but this was one of the only laws to be directly accepted. Others were modified and used, and these are discussed below; for the moment it is useful to consider the effect of Turkish reforms.

Egypt escaped the implementation of these reforms, starting with the Tanzimat of Sultan Abdel Majed in 1839, but it cannot have escaped the general modernising trend. The reasons

expressed in the Hatti Sherif of Gulhane,1839,for encouraging European culture,science and capital,as well as the need to strengthen central government and bring the law into accord with national feeling,were considered valid in Egypt also.It was important to both countries to show that they were each capable of providing a safe haven for foreigners and foreign capital,and a slow progress began towards reform in the laws[12]. This progress was hampered in Egypt for two reasons;the necessity to respect Turkish sovereignty and thus not negotiate openly with the Capitulatory Powers,and the need to have the unanimous agreement of those Powers for any reform.

Egypt was helped by the Decree of Toleration,Hatti Humayoun, of 1856.Paragraph 18 of this decree confirmed the traditional privileges of non-moslems in personal status matters,allowing these to be sent for judgement to the religious leaders,heads of community,or consuls of the relevant communities[13].Without expressly utilising the Decree,Egypt's rulers allowed the sentiments stated in it to be echoed in Egypt.This was of course no more than the principle already mentioned above, that non-Moslems were,logically,not subject to Moslem law in certain cases.In matters of personal status it was clearly logical that a Moslem was judged by Moslem law,and a Christian or a Jew by their own laws.

However,in matters of commerce logic did not suggest that a Moslem merchant's affairs should be judged by a different law from a Christian merchant.In Turkey the Sultan realised that few foreigners would be content to rely on the discretion of the Sultan to ensure justice,despite such safeguards as the Capitulations might appear to give.

As a response to this foreign reluctance,and to growing internal pressure for a fundamental reform in commerce,a Western inspired Commercial Code was promulgated for Turkey in 1850(AH 1266)[14].This law was designed to be applied in commerce generally regardless of nationality or religion.It was not expressly adopted in Egypt.Several other Turkish codes followed:a Code of Commercial Procedure,1861(AH 1278), inspired by the French Codes and repealed in 1880(AH 1297);a

Maritime Code,1863(AH 1280),inspired by the Sardinian, Sicilian and French Maritime Codes;a Code of Civil Procedure, 1880(AH 1297),which was French inspired;and a Code of Criminal Procedure,1879(AH 1296).None of these was adopted in Egypt, but all must have had the effect of showing how Western codes could be used in a Moslem society without fundamental objection or difficulty.

Why,when the Sharia is supposed to provide a framework for daily life,was it necessary to use Western Codes?Two reasons stand out.With the exception of the codification of parts of the Sharia in the Majella,the Ottoman Civil Code[15],Islamic principles were not seen at the time as consistent with modern ideas.Rather than tamper with the Sharia,conservative religious opinion in Turkey was uniform on the adoption of Western Codes[16].The second reason was that modern thinking Turks saw Western codes as both a means to attract foreign trade and capital by inspiring confidence and,as judged by their operation in Turkey in consular courts and other settings,as a reasonably clear means of settling disputes within a legal framework.The Capitulations had thus provided the opportunity of an entry into Moslem society of Western law and ideas[17].

The result so far as Egypt was concerned was that some Ottoman laws other than the Ottoman Law of Mines,mentioned above,were applied.The 1867 rules allowing foreign ownership of land were accepted,and led to some concentration of urban land in foreign hands.The Ottoman Penal Code of 1851 was modified for use in Egypt in 1854,and in 1863 Egypt adopted the 1858 Ottoman Penal Code.

This meant a greater indirect use of Western law which, together with the example Egypt had of consular courts applying foreign law,was to lead to an impetus in progress towards Egyptian legal reform on a Western basis.Foreign law was a tool of modernisation.It was the complexity and diversity of the fora in which it was applied,with consular courts competing for jurisdiction,that most Egyptians disagreed with and wanted to change,rather than the principles of law themselves.The chaotic nature of dispute settlement was

rightly seen as stemming from the diversity of jurisdiction.

Under the rule of Ismail,1863-1879,this desire for reform was finally achieved.He was determined to modernise his country,to forge an African empire,and to make Egypt a part of Europe.He realised that to do all these things he had to provide a stable and just legal system as protection for the foreigners and natives involved.

Ismail's first major move was to negotiate with the Sublime Porte for a firman,granted on May 27th. 1866,to allow the right to rule Egypt on the basis of male primogeniture, rather than male seniority in the family as had been granted in 1841.This cost him a great deal of money,but allowed him to consolidate his position[18].The firman also allowed Ismail to increase his army,and award most state decorations and titles himself.Taxes were still raised in the Ottoman Sultan's name,and the coinage was still Turkish,but for practical purposes Ismail had actual control of Egypt[19].

Negotiations for judicial reform with the Capitulatory Powers began at once.In 1867 Ismail received the title of Khedive(Khedewi Misr) from the Sultan,and Egypt moved from a Pashalik to a Khediviate.He was reminded however that the 1841 firman applied the organic laws of Turkey to Egypt,and that this meant he should bear in mind the general principles of the Hatti Sherif of Gulhane,1839,guaranteeing life,property and honour to residents of the Empire.There is nothing in fact to suggest that he planned to do otherwise,and this reminder seems to be a gesture of continued Turkish sovereignty.Nevertheless,Egypt had achieved internal autonomy.

Some European powers however did not consider that Ismail had any authority to negotiate with them over judicial reform. Whether this was to delay his reforms,or as a safeguard against Ottoman disapproval at a later stage,is not clear, but to remove these objections Nubar Pasha,his Minister, arranged for a firman to be issued on June 8th. 1873 giving Egypt the explicit right to independent civil and financial

administration,and the freedom to negotiate with foreign powers over commerce,customs and police matters.

The result of these negotiations,described briefly later, was to be nothing less than the inauguration of the Mixed Courts in 1875,with the first cases heard in 1876.

Egypt's relations with Turkey played a vital part in the origins of the Mixed Courts.It was not only a question of the example of Turkish reforms,but also of seeing Western laws in operation in the consular courts,and being bound by the constraints of long-standing Ottoman treaties and usage.It is by viewing the Mixed Courts in the context of their origins that the full importance of their later role can be appreciated.The next stage of their origins is in the commercial courts of Turkey and Egypt pre-1875.

Laws and Jurisdiction for Commerce before 1875.

What framework and law existed for the judgement of commercial disputes?Most commerce was in the hands of foreigners[20],and thus most commercial disputes involved foreigners and their consuls.The latter consequently decided most of Egypt's commercial litigation.

If a foreigner was a defendant he had to be sued in his consular court,where his consul applied his country's law to judge the dispute.Consul and defendant were seen by Egyptians,rightly or wrongly,as being in collusion.If the consul's decision was appealed against,there was a new hearing which took place outside Egypt,e.g.to Constantinople for Great Britain,to Aix for France,to Ancona for Italy,and to Athens for Greece.This procedure meant that even if the foreigner lost in the consular court,he could appeal to another court in his home country(or at least outside Egypt), staffed by his fellow nationals.If the foreigner won in the consular court in Egypt the Egyptian party was faced with an overseas appeal,which acted as a disincentive to sue at all.

In its day to day working the consular system was even more disadvantageous for the Egyptian.Many consuls,especially those of Greece,had a reputation for prejudice and bias[21],and Egyptians were faced with fifteen separate consular jurisdictions[22].It was common for foreign defendants of different nationalities to transfer property from one to another because each change of possession meant a new action was necessary in a new consular court.

Added to these difficulties of getting a favourable judgement against a foreigner,it was almost impossible to execute such a decision because the only people who could do so were the consuls,who were generally as reluctant to upset their nationals by any enforcement of legal judgements as they were to give judgements against their nationals in the first place.

The advantages of consular protection led to Ottoman subjects, Moslem or Christian,arranging with consuls to be treated as

protected subjects,and therefore entitled to claim the same privileges that foreigners enjoyed.The whole consular patchwork jurisdiction was stifling commerce and trade,so much so that The Times declared in 1870,on February 12th., 'that no wise Egyptian is in partnership with a foreigner, nor accepts his surety'.

Consular jurisdiction,originally intended as a delegated authority of the ruler in personal status matters,had become so abused that it resulted in a foreign monopoly over Egyptian commerce.It should also be noted that the system was equally disadvantageous for a foreigner who sued another of a different nationality.

Such was the scheme for foreign defendants.What happened when a foreigner had a dispute with the Egyptian government? This was quite common,because of the vast modernisation plans started by Egypt's rulers.Essentially,no Egyptian court would condemn the Egyptian government or the Khedive. Thus the consuls took up claims,however absurd or dishonest, and put them officially and with the force of their position to the Egyptian rulers.In this way Egypt paid out 'indemnities' for many worthless projects,and was unable to have claims tested on their merits[23].Ismail is supposed to have stated bitterly that it would cost him £10,000 if a foreign concession hunter caught a cold.Behind this irony was an indication of deliberate fraud,and an indication of the validity of most such claims is provided by the example of an award of the Mixed Courts,when these claims were transferred to them,of £1,000 in place of a claim for 30 million francs[24].

Egyptian jurisdiction over commercial affairs did not therefore exist in any recognised sense.Foreign laws were applied by foreign consuls,and diplomacy was used to settle government disputes.Despite this there were some,unsuccessful, efforts to provide a court for commercial cases between foreigners and local subjects.

In Turkey 'mixed' cases,between foreigners and natives,were

tried either in the ordinary Turkish courts with a consular representative present,or by special commercial tribunals staffed by Turkish and foreign judges[25].This appears to have started in 1740,when Frenchmen in dispute with non-Frenchmen were allowed,at the parties' option,to have either an Ottoman judge or the French ambassador decide the case[26].

Other 'mixed' courts were established in Turkey in 1820,by verbal agreement between France,England,Austria and Russia, for cases between foreigners of these different nationalities. The defendant's consul could choose two judges and the plaintiff's consul would choose a third.The courts ended in 1864 when the French court at Aix declared that they were not obligatory for Frenchmen[27].It has been said that this type of court was useless because evidence was generally ignored,lawyers were not allowed and cases frequently adjourned for many years[28].The observation may in fact have applied to all such courts.Certainly,in 1847/8 the Turkish court was reorganised and a tribunal of 14 merchants, seven Turkish and seven foreign,under the Presidency of the Turkish Minister of Commerce,was set up.This was reorganised in 1856 and attempts made,under the charter of Hatti Humayoun, to extend it to Egypt.

Although the opposition of Said,the Egyptian Pasha,prevented the adoption of this particular framework,new plans were proposed for Egypt in 1860 to cover claims against the Egyptian ruler.They were not well received by the Capitulatory Powers,both because French Codes were suggested for their use and because the Appeal court was to be at Constantinople.It is not clear whether these courts were actually set up or not[29] but in 1861 a new system of 'mixed'courts was arranged for Egypt.In Cairo and Alexandria a panel of leading foreign citizens was to elect judges each year.The court was to have five judges,two foreign and two native,with an Egyptian President.Appeals from Cairo were to Alexandria,and vice versa,with the addition of four assessors to the five judges.

The laws to be used were a mixture of the Ottoman Code of

Commerce,customs of the country,a special code of procedure, and the French Civil Code if all else produced no answer. The courts were not a success.Consular jurisdiction over foreigners was paramount,and thus Egyptians usually found themselves as defendants in the new courts.Foreigners however had no confidence in the courts because the judges were generally not legally qualified.It is also thought that another plan for commercial cases involved decisions by the President of the Customs House,but this too was not a success[30].

Thus there was no uniform law or jurisdiction in Egypt. Depending on the forum the law might be French,English,or Greek etc.,or a mixture of custom and Ottoman law.More often than not the judges did not understand legal principles and enforcement was mostly futile.Diplomacy provided great benefits to persistent claimants,and reform was badly needed.

Necessity for the Mixed Courts.

Against the above background it is not surprising that feeling in Egypt was poised for reform.The judicial chaos of the country was obvious,but it would be useful at this stage to summarise the need for the new courts.The abuse of the Capitulations by consular privilege and jurisdiction, together with the need to prevent economic and financial stagnation from that jurisdiction,resulted in three minimum aims of the two principal reformers-the Khedive Ismail and his Minister Nubar Pasha[31].They wishes to ensure:
1.Justice in claims against the Egyptian Government;
2.Justice between litigants of a different nationality;
3.Protection for foreigners from the risk of arbitrary government actions.

Progress to Reform.

Nubar Pasha,in charge of the Reform,as it became known,for Ismail,had to negotiate with each of the Capitulatory Powers to ensure acceptance of a change.It is beyond the scope of this study to consider in detail the negotiations from 1867 to 1873,but a brief consideration of the progress he made is useful to explain the support for and later organisation of the new courts.

What countries were involved?The Capitulatory Powers were Austria,Belgium,Denmark,France,Germany,Great Britain,Greece, Holland,Italy,Norway,Portugal,Russia,Spain,Sweden and the USA[32].The countries whose subjects were the most numerous in Egypt were Greece,France and Italy[33],and their citizens were very much against the idea of reform[34].The Greeks were vociferously opposed and wrote to the United States Government to ask its support in preventing change.The British government however was very much in favour,and the American approach became one of general support for change.

Despite the approval of Great Britain and the United States the French government was adamant in its opposition. Indeed,it is due to France that every scheme for the new courts was rejected,rewritten and discussed again,until eventually Nubar and Ismail felt confident enough to go ahead without complete French approval.There was some support in France from the Emperor Napoleon III,and from de Lesseps who knew Egypt well.The German government were enthusiastically in favour,and the smaller powers were won over by the prospect of having their nationals chosen as judges.After more French delay Ismail went ahead and inaugurated the courts on June 28th. 1875,in the absence of the French.Faced with this move the French Parliament, albeit reluctantly,agreed to the Reform.

Before final acceptance by the countries concerned the new courts,their jurisdiction and laws,had to be discussed and agreed.On October 28th. 1869 an International Commission was arranged in Cairo,under Nubar's presidency,with delegates

from Austria,Germany,Great Britain,Italy,Russia,France and America.It had nine meetings to the 5th. of January 1870, and considered in detail Nubar's plan for reform.This plan was far reaching and proposed wide jurisdiction over all commercial and criminal matters.This would have left only personal status matters for the consular courts and the foreign communities in Egypt immediately opposed the plans. As a result the French were able to have the original scheme withdrawn and a new set of proposals had to be considered.

There was then a delay of two years during the Franco-Prussian war,and this gave the Turkish Sultan time to oppose the independent line taken by Egypt.Nubar thus had to divert his attention to arranging the 1873 firman from the Ottoman Sultan,which gave Egypt greater control over negotiations. Discussions,to placate the Sultan,were resumed in Constantinople rather than Cairo.

During these new discussions the proposed criminal jurisdiction of the courts was gradually wittled away to negligible points,and wide amendments were made to the civil and commercial proposals.

A second international commission sat at Cairo in January 1873 to consider the newer scheme,and in February 1873 a framework and set of laws were approved by it for forwarding to the Capitulatory Powers.It is hard to overemphasis the difficulties that Nubar and Ismail faced,especially against the entrenched opposition of France and most foreign residents. The latter viewed the Reform as a lessening of their power, rather than good progress,and Nubar also had to allay Turkish fears.Nevertheless he succeeded,and the time between 1873 and June 1875 was spent mostly in arranging practical matters such as the signing of treaties,appointment of judges and staff,and the selection of suitable buildings.The eventual jurisdiction of the courts,and their laws and organisation, is dealt with in the next chapter.

The Inauguration.

On September 24th. 1871 Ismail Pasha wrote to Sir Henry Elliott,H.M. Ambassador at Constantinople,as follows: 'By introducing judicial reform in Egypt,I give an example, and render a very great service,to all those interested in the well being of the population'[35].

This spirit pervaded the Reform.The idea of the courts had been accepted gradually,and by 1875 observers of Egypt were looking forward to the inauguration of the new courts at the Palace of Ras el-Tin in Alexandria[36].It was by all accounts a magnificent day,and set the scene for the later dignified working of the courts.The Khedive made a short speech:'With the aid of the Sultan,and the support of the Powers,I have been able to inaugurate the judicial reform and install the new tribunals.I rejoice to see around me so many eminent and honourable judges to whom I remit,with every confidence,the task of administering justice.All interests will find in your wisdom perfect security,and your decisions will thus obtain obedience and respect.This day, gentlemen,will be marked in Egyptian history as the commencement of a new era of civilisation.God aiding us,I am persuaded that the future of our great work is assured'[37].

In January 1876 Riaz Pasha,the then Minister of Justice, opened the courts themselves,and cases were heard on February Ist. 1876.The reform had been accomplished,but at a great cost.It has been said that the money spent on arranging the reform came to over 2,500 million gold francs[38].This was in fact the Egyptian debt at the time[39].Expensive as they were the Mixed Courts did prove to be the sound base of future prosperity for Egypt,and in 1880 Ismail,who had been deposed by the Ottoman Sultan in 1879 for non-compliance with a firman,wrote to the Sultan:
'Sous mon règne l'Egypte a inauguré chez elle,après de longues résistances,sa Réforme Judiciaire qui a preparé,pour l'avenir, les moyens d'établir l'harmonie d'une bonne justice dans le contact,des deux Civilisations de l'Orient et de l'Occident'[40]. Though he was perhaps a little premature in his statements,his assessment of the future was to be proved correct.

Notes to Chapter I.

1.Capitulations were not one sided agreements forced on an unwilling ruler.The word itself stems from the use of chapters(capitula)to set out terms,and is not used in the modern sense of surrender.These treaties were bilateral and freely negotiated,usually with the aim of expanding trade between the Ottoman Empire and the European countries to the mutual benefit of all signatory powers.

2.Holt(ed.),Political and Social Change in Modern Egypt (Anderson,Law reform in Egypt),1968,London,OUP,p.211.

3.Khadduri & Liebesny(ed.),Law in the Middle East,Vol.I, 1955,Washington,Middle East Institute,p.361/362.

4.Khadduri(ed.),op.cit.,p.309.

5.There are conflicting reports of the first dates for modern Capitulations.Various writers cite the 1535 treaty with Francis I of France-Brinton,The Mixed Courts of Egypt, 1968,Yale,YUP,p.3;Maakad,Notions Générales sur les Juridictions Mixtes d'Egypte,1922,Alexandria,Court of Appeal,p.2. The latter writer stated that Capitulations were entered into with other powers eighteen times up to 1861.At the time of the last treaty the Powers were:Great Britain(1675), Belgium(1838),Denmark(1756),France(1740),Greece(1855),Italy (1861)(with Sardinia,Tuscany and Naples much earlier), Holland(1860),Norway & Sweden(1737),Portugal(1843),Spain' (1782),America(1830),Russia(1783),Germany(1761),Austria-Hungary(1718)-see British Year Book of International Law (BYIL),1937,Vol.18,p.79.

6.Milner,England in Egypt,1894,London,Ed.Arnold,pp.48-50.

7.Chirol,The Egyptian Problem,1921,London,Macmillan,p.59. Also,Cromer,Modern Egypt,Vol.II,1908,London,Macmillan,p.427, & Marlowe,Spoiling the Egyptians,1974,London,Andre Deutsch, Ch.10,where Marlowe states several times that Britain was in favour of taxing foreigners,and the British government view was that the Capitulations did not mean freedom for foreigners from all direct taxes.

8.Firmans were contractual charters between the Ottoman Sultan and Egypt's rulers.The recipient of a firman was bound to observe its terms,and if he failed to do so the firman was

cancelled.In 1879 this led to Ismail's deposition by the Sultan;see note 9 below and Chapter 3 generally.

9.See McIlwraith,The Declaration of a Protectorate,Journal of Comparative Legislation(JCL),new series,1917,Vol.17,p.238 et.seq.Note especially the Memorandum to the Convention of London:'If Mohamed Ali or any of his successors should infringe the conditions on which the hereditary government of Egypt is conferred on him,he may be deprived of his office'.

10.de Freycinet,La Question d'Egypte,1904,Paris,Calmann-Levy, p.92.France became a guarantor later.Note that Egypt had an obligation to assist the Ottoman Empire with an army when required;thus Egyptian troops were in the Crimea,1854,and in Russia,1877-de Freycinet,op.cit.,p.94.

11.Ziadeh,Property Law in the Arab World,1979,London, Graham & Trotman,p.6;see Hooper, The Civil Law of Palestine, 1938,London,Sweet & Maxwell,Vol. I ,for the Majella.

12.See gen.Khadduri,op.cit.,p.284(Mardin).

13.Maakad,op.cit.,p.3;see also Note,Law Quarterly Review(LQR), 1929,Vol.45 ,p.501,on the same point.The treaty itself is in Young,Corps de Droit Ottoman,1905,Oxford,Clarendon Press, (Vol.II),p.3.

14.Khadduri,op.cit.,pp.288-289(Mardin);it is implied this code was French based.

15.The Majella was a compilation of Hanafite principles. Cevdet Pasha,in charge of the scheme,rejected suggestions of using the French Civil Code on the grounds that the reason for legal confusion in civil matters was because Hanafite principles were not clearly set out,not because they were unsuitable for application.The Majella was published in 16 parts between 1870 and 1877,and was only repealed in 1926; see Khadduri,op.cit.,pp.292-295(Onar);English translation as Hooper,op.cit.,see note 11 above.

16.Coulson,History of Islamic Law,1964,Edinburgh,EUP,p.149; this inapplicability of the Sharia in many matters has formed the subject of discussion in arbitration awards.In Petroleum Development(Trucial Coast)Ltd. v Shaikh of Abu Dhabi,(1951) 18 ILR no.37,p.144 Lord Asquith,the arbitrator,rejected the Islamic law of Abu Dhabi as not capable of regulating a

modern commercial instrument.In Ruler of Qatar v International Marine Oil Co.Ltd..(1953) 20 ILR p.534 the arbitrator stated that he found the law contained insufficient principles for interpreting the contract in question,and in Saudi Arabia v Arabian American Oil Co.(Aramco)SA,(1958) 27 ILR p.117 the two arbitrators and referee held that the concept of oil concessions was undeveloped in Islamic law and world-wide custom in the oil industry,together with world case law and doctrine was the appropriate means of decision.This view is by no means as settled to-day.

17.Coulson,op.cit.,pp.150-151.

18.The Egyptian tribute to Turkey is said to have increased from £400,000 pa to £750,000 pa;Vatikiotis,History of Egypt, 1980,Weidenfeld & Nicolson,p.75.

19.See gen.McIlwraith,JCL,1917 ,Vol.17,p.238 et seq.

20.In 1836 there were several thousand foreigners in Egypt. By 1876 this figure was 100,000-de Freycinet,op.cit.,p.142.

21.Milner,op.cit.,pp.49-50;the British were thought the fairest.

22.Brinton,op.cit.,p.6.

23.de Guerville,New Egypt,1906,London,Heinemann,p.89.

24.Milner,op.cit.,pp.54-55;see Chapter 3 note 46.

25.Brinton,op.cit.,p.4,but no dates are given for these courts.

26.Khadduri,op.cit.,pp.324-325.

27.Brinton,op.cit.,p.6.

28.Elgood,Transit of Egypt,1928,London,Ed.Arnold,p.120.

29.Brinton,op.cit.,p.7.

30.Ibid.,p.8;Scott,Law Affecting Foreigners in Egypt,1908, Edinburgh,W.Green & Sons,p.203.

31.Nubar wrote,on 4.9.1868,as follows:'Voulez-vous connaître mon opinion sur la justice consulaire en Egypte?Elle est aussi juste et aussi équitable que la justice du Ciel.Le consulat de Grèce représente,en Egypte,la cour de l'archange Gabriel.L'archange Michel est représenté par le tribunal d'Italie.Saint Paul en personne,est descendu au consulat d'Angleterre et saint Pierre,ses clefs à la main,tient un lit de justice au consulat de France.Quelle plus haute idée peut-on avoir de la justice consulaire en Egypte?Mais il y a un draw-back à tout cela;c'est que chacun de ces archanges

et de ces saints a sa loi,sa manière de proceder.Or,comme un pauvre diable,qui entreprend une affaire,ne connaît pas qui le jugera,il ne peut jamais se mettre en règle;il est appelé devant saint Pierre,lorsqu'il croyait avoir affaire à saint Paul;il est troublé,confondu;il a raison et,malgré cela,il est envoyé saintement à tous les diables';see van den Bosch, Vingt Annees d'Egypte,(date unknown),Vol.II,Lib.Acad.Perrin, p.143,describing part of the Abdin Palace archives.

32.Maakad,op.cit.,p.8.

33.Livre d'Or,Alexandria,1926,p.66:in 1874 the figures were-

Greece	34,600	Germany	1,100
France	17,000	Holland	220
Italy	13,906	Spain	150
Austria	6,300	Russia	127
England	6,000	Belgium	110

Sweden,Denmark,USA,Portugal & Switzerland a total of 40.

34.This is based on the records described by the 1926 Procureur-General,Baron van den Bosch,in Livre d'Or,op.cit., pp.481-495;also see ibid. an article by Brinton,pp.73-82.

35.Trans.,see Livre d'Or,p.7.

36.The Times,22.6.1875;a list of Court of Appeal judges is given on that date-Lapenna(Austrian),Barringer(USA),Giacone (Italy),Koumani(Russian),Scott(British).

37.Trans.,official procès-verbal,Livre d'Or,p.473,and The Times 29.6.1875.

38.Livre d'Or,p.71(review by Leon Pangalo).

39.Most of this money went to the Ottoman Sultan,and some in bribes to various people in Constantinople.Gen.Ignatiev, the Russian ambassador,received £8,000 in Consols according to Crabites,Ismail the Maligned Khedive,1933,London,Routledge, and the same source details other payments to officials in the Ottoman capital,and to newspapers there and in Europe. Crabites,a judge in the Mixed Courts,obtained these figures from the Royal Archives at the Abdin Palace,Cairo.

40.Livre d'Or du Journal la Reforme,1945,Alexandria,La Reforme,p.215.

CHAPTER TWO

STRUCTURE AND LAWS OF THE MIXED COURTS,AND THEIR PLACE IN EGYPT.

Introduction.

We have considered in Chapter 1 the origins of the Mixed Courts. The next stage is to look at their structure and place in the Egyptian legal system.Starting with Jurisdiction,to determine the scope of the courts,this chapter deals with The Law of the Mixed Courts,followed by The Judiciary,with a look at the background and experience of the first members of the bench. It continues by considering The Mixed Court Bar and its influence, and then The Organisation of the Courts,to indicate the administrative basis of the system.This leads to The Parquet,and in Egyptian Sovereignty and the Mixed Courts the question of whether the courts were Egyptian or not,and whether they derogated from Egypt's sovereignty,is reviewed.

Jurisdiction.

The jurisdiction of the Mixed Courts may be viewed in two ways,by territory and by parties:

1.Jurisdiction by territory-

The territorial jurisdiction was throughout the territory of Egypt.The Alexandria first instance,or District,court covered the Governorates of Alexandria and Rosetta,and the Moudiriehs of Behera and Gharbieh,together with the Western frontier territories.The Cairo first instance court covered the Governorate of Cairo,the Moudiriehs of Galiobieh,Giza, and Menoufieh,and Middle and Upper Egypt to the Sudanese border.The Mansourah District Court covered the Governorates of Damietta,El Arish,Canal and Suez,and the Moudiriehs of Charkieh,Dakelia,and the Eastern frontier territories[1].

Each court thus had a clearly defined area of operation,and the major cities of Cairo and Alexandria had their own court. Alexandria was also home of the Court of Appeal,situated there both because that city was Egypt's major trading port and commercial centre,and also because the Mixed Court of Appeal,heading the Mixed Court hierarchy,was consequently further away from government and ambassadorial interference.

The grouping of all the courts in the Delta,and the absence of a court in Upper Egypt,was later to prove of some inconvenience and doubtless led to Mixed cases in Upper Egypt,when the cost of going to Cairo outweighed the sum or principle at stake,being decided by the Native Courts there with the parties' agreement.This was,however,of little concern in 1875.Almost all trade and coomerce was in the Delta,and the Native courts at that time were universally viewed with suspicion.It could not have been contemplated that the three Mixed Courts would be insufficient for all cases,and it would have been difficult to attract judges and staff to serve in Upper Egypt.The Sudanese troubles were still on,and the frontier area was regarded as unhealthy.

The territorial application of the courts over the whole country meant that the only limiting factor in their right to hear cases was the extent of jurisdiction by virtue of

the parties.

2.Jurisdiction by parties-
The purpose of the courts was to adjudicate in mixed cases. The terms 'mixed courts','mixed law','mixed codes' and similar phrases serve to separate these new courts from other Egyptian legal institutions.There were four basic court systems in Egypt in 1875:
a)Sharia courts,which had residuary jurisdiction over all cases not within the competence of other courts;
b)The Meglis,or administrative courts of the ruler,for general regulations and crimes;
c)Personal status courts-foreigners to their consuls,and non-moslem locals to milla or religious courts.
d)The Mixed Courts.

It is therefore a matter of convenience to refer to the attributes of the new courts as 'Mixed' but in fact,as all laws,courts and codes were Egyptian,the only mixed elements were the parties.Regardless of their actual nationality parties were subject to the uniform Mixed codes.Nevertheless, the term 'mixed' does illustrate the courts' jurisdiction by virtue of the nature of the cases,and will be used throughout to identify the new courts and their various functions.It must be emphasised though that these were Egyptian courts.

The Mixed Courts had exclusive jurisdiction over civil and commercial litigation between natives and foreigners,and between foreigners of different nationalities,but this did not extend to personal status matters.These latter questions were decided by the courts of personal status,i.e.the relevant religious or consular courts.In addition to this uniformity of jurisidiction over mixed cases the Mixed Courts had jurisdiction over all land and property transactions between foreigners of the same nationality[2].The only non-personal status matters still before the consular courts were therefore actions between foreigners of the same nationality over moveable property or other civil matters not involving land.

The definition of foreigner and native,which was vital to the question of giving or denying jurisdiction,was to be a constant issue in the courts.Did foreigners include someone protected by the foreign consulate?Did it include foreign nationals of countries other than those who had signed the treaties for judicial reform?Did native mean Egyptian or Ottoman subject?

These matters were to be the subject of litigation time and time again,with many problems originating from external issues and giving consequential importance to the courts' decisions.For example,the French Mandates over Syria and Lebanon,and the British Mandate over Palestine,together with the release of other territories from Ottoman control after and before the Ist.World War created nationalities and citizenship not contemplated in 1875.How were these to be reconciled with the courts' jurisdiction over parties of different foreign nationality?

The new courts also had jurisdiction over the Egyptian government,Administrations,and Estates of the Khedive and his family,when foreigners were involved in suits against them[3].This jurisdiction not only meant an end to claims by diplomacy against the Royal family,but is an interesting precursor to the attitude of the courts towards sovereign immunity and crown privilege.Although the courts were Egyptian,and gave decisions in the Khedive's name,there was nothing inconsistent in giving decisions against the Khedive or his Government or family when he,albeit reluctantly,had put this very point forward as an attempt to gain foreign support.

It is clear though that,as might be expected,no questions of sovereignty or public administration could be decided by the courts[4].They were themselves in favour of an approach that separated the public and private capacity of a sovereign,treating the private nature of his acts as within their jurisdiction.This attitude was to lead to major developments in later years in the theory of acta imperii and acta gestionis.

The new courts were expressly barred from hearing cases by foreigners against religious establishments where the recovery of land or buildings was sought,but they were allowed to decide claims over legal ownership of the land[5]. This distinction was to preserve some of their rights in immoveable property cases,but as many disputes between foreigners and religious establishments were on the same level as personal status disputes they were better suited to the religious or consular courts,although some did come before the Mixed Courts.'Family' arguments within religious groups were not therefore given much publicity in the open judicial system.

A further provision set out,in clear terms,that where a foreigner held the mortgage of land as security for a debt the Mixed Courts had jurisdiction over the mortgage,its consequences,and the sale and account of the proceeds if that event took place[6].This provision was in fact almost redundant,because the courts themselves formulated the theory of a mixed interest,so that they claimed jurisdiction whenever a foreigner appeared in litigation.This controversial reasoning meant that the courts took jurisdiction over companies,public utilities,businesses,assignment of debts, and any other matters where a foreigner could be seen or suspected,often regardless of whether,in fact,a foreign element existed or not.This theory of a mixed interest provided some of the most important cases decided by the Mixed Courts in the early years,and necessitated close legal argument by Bench and Bar.

Jurisdiction in penal matters was theoretical,because none of the Capitulatory Powers had agreed to extend the jurisdiction to cover criminal offences.Thus the elaborate and carefully drafted[7] Penal Code and Code of Criminal Procedure were of no use,and the only criminal jurisdiction taken on was for police offences,and offences against the administration of justice in the Mixed Courts themselves[8]. These latter offences can be described as those that placed a person in contempt of court[9],as well as physical assaults against judges or employees.On the whole the initial criminal

jurisdiction of the courts was of little importance compared to the civil and commercial work,but the notion of police offences was to produce significant arguments and legislative action in later years.

The Law of the Mixed Courts.

Decisions of the courts gradually became based on a mixture of codes,statutes,jurisprudence,usage,custom,and natural law and equity.These factors combined to be the law of the Mixed Courts,but at the beginning the law used to judge cases in the new courts was based on codes that had been approved by the International Commission which ended its sitting in February 1873.

These codes had been drafted by the Secretary of the Commission,Maître Manoury,a French lawyer from Alexandria. A superficial view of the Mixed Codes can produce the conclusion that they were simply the French codes reenacted. Bearing in mind the short time available to Manoury, reputedly the summer of 1872,it is also tempting to conclude that the Codes were hastily,and thus perhaps badly,adapted. Several points thus need to be considered:

1.Why choose codes as a new system of laws?
2.Were the Codes 'French'?
3.Were they well drafted,or at least suitable for Egypt?

1.Codes-

Egypt had no set of laws that could be made applicable to the foreigners whom it had successfully sought to bring within the jurisdiction of the new courts.Part of the concern shown by the Capitulatory Powers was over the laws to be applied,and so Egypt had to produce a complete set of laws for discussion.

The choice of a series of codes was quite logical and

reasonable.By setting out general principles which the judiciary could understand and apply,Egypt was following the practice of most European countries.It was also continuing in a familiar and similar format to the many Turkish laws that had been promulgated as codes,and in the variety of mixed commercial courts of both Turkey and Egypt some foreign codes had been used.In addition,the majority of consular courts used codes of their own as a base for decisions,and therefore codes were familiar to all who would need to use the new courts,whether they were Egyptians or foreigners.

It is of equal importance to note that the alternative, a system of common law based on a mixture of statute and precedent, could not be used at the start because the precedent of Egyptian decisions up to that point was neither fully recorded nor satisfactory.The only way to gain approval from the Capitulatory Powers was to present fresh codes.No question arose of using the law as practised in Egypt because it was precisely that chaotic judicial system that was being reformed.

Codes also fitted in with the general Civil(as opposed to Common) Law ideal that the law should be freely available to the public.It is not within the scope of this study to conclude either way but codes,like statutes and the Common Law,have to be judicially interpreted,and a significant and important body of case law was eventually built up in Egypt over the life of the Mixed Courts,so much so that the use of precedent resembled the English pattern rather than that of a Civil Law system.

On this particular point of public knowledge it is suggested that codes are,in practice,no more accessible per se to the public than statutes,but as they are compiled and put forward by topic and subject matter,they are more easily collected and presented as convenient titles,headings and chapters such as the law of commerce,the law of maritime trade etc.,especially as they can be seen to be the sole repository of the law.Codes of some nature were thus a logical choice.

2.Were the Codes 'French'?-

The Codes were presented in French to the Capitulatory Powers,and accepted in that language.It is therefore easy to suggest that they were French codes adapted to Egypt. That is,however,an over simplification.France under Napoleon had undoubtedly set the scene for European legal progress by promulgating codes that provided in neat compartments the general principles of law for any given area.Thus procedure was set out in its own code,commerce in another, and penal law in a third.This meant,of course,that there had to be classification on a scale not encountered in the Common Law.It mattered significantly whether a person was subject to the Commercial Code,or the Civil Code,and so definitions of who and what was within the terms of reference of each code,added to the basic legal concepts,provided a convenient package.

The attraction of the French codes thus lay,initially, largely in their simplicity and ease of adoption.After all, the 1804 Napoleonic Code was no longer,in the 1870s,the model of modern civilisation originally intended.The spread of these codes through Europe,by voluntary acceptance and French military conquest,meant that continental Europe had become codified in its system of law by the time of legal reform in Egypt.A system that was originally French had become continental,and no assumption that the Egyptian Codes were simply paraphrased French ones can be made.It is one thing to use codes as a framework,and quite another to assume that because of a similarity in the layout and titles that they were thus French.The real point is that the initial format was that of a Civil Law as against a Common Law system.Why then,it may be asked,were the Codes in French?

French was the language that most people in Egypt had in common.Although the foreign communities were cosmopolitan, and the educated Egyptians often had more than two languages to choose from,the easiest way for a foreigner,whether he was Italian,Belgian,Swiss or Russian to converse with a local, whether he was Turkish or Egyptian,was through the medium of French.This was also the case if the foreigners wished to do

business amongst themselves,and often between Turk and Egyptian also.Added to France's cultural influence through legal writings and philosophy,and the French education that many Egyptians had enjoyed,this led to an easy assumption of the French language as a lingua franca.

Once French had been accepted as the medium,it became easier to choose some French codes as a base and alter these as necessary.It is in this alteration that the contention that the Mixed Codes were French can be shown to be false.

First it must be considered that certain legal concepts are upheld in all modern legal systems.For example,quiet possession of legally acquired property is not peculiarly French,nor is the bankruptcy of insolvent debtors,nor upholding valid contracts,nor punishing negligent tortfeasors. Secondly it must be considered that the Mixed Codes differed greatly from their French counterparts in important areas,so much so that it is far truer to say that the Mixed Codes were adopted from continental codes generally,and adapted for Egyptian use,rather than to say that they were a précis of French law.The latter was a base,rather than a mould from which to produce French ideas for use in Egypt[10].

Manoury,despite the speed at which he completed the drafts, nevertheless managed to improve many points thought deficient in the French codes[11].

Examples of a change to some other system are more difficult. European law generally followed similar patterns,and it is hard therefore to say that one provision is French,or Italian or Swiss.There are nevertheless some instances where the difference between the Mixed Codes and other systems as a whole is clear.There were no provisions at all on personal status because these matters remained consular or religious. This cleared out all possibility of French influence in matters of inheritance,succession,marriage,divorce,majority etc.,and thus topics of great concern to people in their personal relationships and daily lives were unaffected completely by French law,unless the consular or religious judge applied such principles of his own volition[12].

Another main difference was in the law of property,where many Moslem rules,for instance that of preemption(shufa), that is the legal right of a contiguous landowner to buy property offered for sale,at the market price,in the place of a prospective purchaser,were drafted into the Mixed Civil Code[13].

Other Islamic provisions as to co-owners in multi-occupation were adopted[14],as were those relating to servitudes[15].The Moslem idea of ghabn fahish,or grave deception was used where applicable,and hidden defects or vice cachés were judged by the Moslem distinction of good and bad faith as an operative factor[16].Pledges were dealt with as rahn[17],and loans closely followed the Islamic ariyya[18].

Further provisions were a ban against the sale of future crops[19],the risk of loss or damage remaining on the vendor in certain circumstances[20],an option of inspection,khiya, giving the buyer a reasonable time after the sale agreement to reject goods[21],provisions relating to a gift or sale in a last illness[22],and trust provisions[23].

On other occasions the articles refer to 'l'usage des lieux'[24] and 'l'usage du pays'[25],and rules as to capacity were governed by national laws,a clear reference to the old Capitulatory regime before 1875[26].There was ample scope in the Mixed Codes to cover traditional Egyptian practices,and the result was a blend of Islamic and Civil Law provisions[27].

These factors,combined with the ability of the Khedive to promulgate laws on a variety of internal matters,such as highway laws,irrigation rules,and health and quarantine regulations,meant that the total body of laws in use was truly Egyptian.It is equally true that the judges,appointed from many foreign countries as well as Egypt,interpreted the laws for the benefit of Egypt and Egyptian circumstances. Thus any influence of French law that may have transposed itself into the Codes was soon influenced itself by Egyptian surroundings.While using the vast amount of French legal thought as an aid where necessary,judges were clearly able to interpret the Codes in an Egyptian context,free from

enactments not suitable to the Orient.

Due to the vast areas to cover,and the principles common to all fair and just systems,it is difficult to properly conclude on France's influence,direct or indirect.It certainly cannot be ignored,but it can be overstated.The comments of Sir Malcolm McIlwraith 'it is in reality a system of almost pure and unadulterated French law'[28], must be seen in the context of a British official in the Egyptian Government who,despite the British Occupation in 1882,could still find no obvious trace of English law in the Mixed Courts.Sir Maurice Amos,another leading English lawyer in Egypt,echoed these sentiments[29].On the other hand leading 'Egyptian' lawyers from England and America found so little difference between so many principles of English and French law as propounded in Egypt that an argument as to which laws the Mixed Codes were based on became to them of almost theoretical interest[30].Cogent arguments have also been put forward to show that Italian law was a major influence in property matters[31].

Some Mixed laws,however,were almost identical with their French counterparts.Thus the Mixed Code of Instruction was an almost literal copy of the 1808 French Code,with a different order and some amendments[32],although it has been well argued that the development of Egyptian criminal law owed more to English law rather than French,at least from 1882 onwards[33].

Taking all these facts together it is submitted that there can be no dispute that the Egyptian Mixed Codes were influenced by the Napoleonic Codes,but equally that they were specially drafted for Egypt,with changes and amendments of more than a cosmetic nature from continental models.

A pertinent question in view of Great Britain's military and diplomatic power at the time is whether the Egyptians adopted any English law and if not,why not?In fact,there is little direct English influence on the 1875 codes.First of all,England could not claim any cultural or intellectual following in Egypt large enough to warrant English as a

language for the new laws.Secondly,English law in 1873 was still basically precedent and authority,with little relevant statute law.The great commercial codifications of Bills of Exchange(1882),Sale of Goods(1893)and Marine Insurance(1906) had not yet become reality,although various codes had been drafted for British India,such as the Penal Code 1861,the Evidence Act 1872,and the Contract Act 1872.It was not for the Egyptians to codify and then translate the principles of English law when the English themselves had not yet generally done so.This meant that attention naturally turned to continental Europe for inspiration.

It is also relevant that Great Britain was only one of many Capitulatory Powers.She could afford to accept continental style laws if the content was satisfactory,and there is no reason to believe that the other Powers would have been prepared to accept a system based on the uncollected state of the 1873 Common Law.Great Britain was more concerned with the substance of the reform than with form alone.

3.Were the Codes well drafted?-

This brings us to a small but important point.Can laws[34] drafted in a few months,covering a Civil Code(774 articles), a Commercial Code(427 articles),a Code of Maritime Commerce (275 articles),a Code of Civil and Commercial Procedure(816 articles),a Penal Code(341 articles),and a Code of Criminal Instruction(277 articles),really be anything but a hasty and superficial unsuitable selection of laws?

Manoury was a French lawyer resident in Egypt,and he had been accustomed to the country and the people.It must be assumed that he had a better than average comprehension of the French Codes and of Moslem law.If he did not,it is difficult to explain how he managed both to improve those French provisions adopted,and to include other European and Moslem principles. It must also be remembered that he was the Secretary of the International Commission,and in touch with the developing ideas and needs of the Egyptian plan and the Capitulatory Powers' responses to it,over a long period of time.

Given the base of some French law,the absence of any personal status matters,and the clear adoption of Moslem law,his task was quite possible.Manoury was not alone amongst jurists in the singlehanded drafting of laws.Chalmers in England was later to draft the Bills of Exchange Act,the Sale of Goods Act and the Marine Insurance Act.They have stood the test of time,and the Mixed Codes,so cleverly drafted by Manoury in 1873,were basically unchanged until 1937 when the largely unused Penal laws were modified.So useful and so suitable were the Mixed Codes that they formed the raw material for the 1883 Native Court reforms.Most of the Native Codes were completely identical,and only the order of some of the articles was changed.

Therefore the Mixed Codes were sufficiently well drafted to stand the test of time[35].One provision in them made them practically excellent for Egypt and at the same time provided the greatest single difference between the Mixed Codes and French law.If no answer could be found within the codes the judge was to be guided by the principles of natural law and equity[35A].This was quite contrary to the idea in French law that the answer to all legal problems was to be found within the codes,and in 1873 the French aversion to judge-made law was still apparent in France.

The provision permitted judges to use their own sense of natural law and equity to decide problems not expressly covered by the articles,and in this respect it was a masterly improvement on most European codes.The only similar provision was in the Italian Code of 1865[36],although the later Swiss Civil Code of 1907 included a similar article[37].

Mixed Court judges,whether native or foreign,were able to use this provision to allow their own assessment of public policy and the climate of opinion,as well as the more basic dictates of natural law and equity,so as to decide a case with a fair conclusion.This inherent flexibility was used time and time again,and made the Codes as a whole perfectly suitable for Egypt and her developing society and needs.The difference in approach from many continental judges ensured

that the courts built up a sound jurisprudence of their previous decisions in related fields and allowed precedent, as well as custom and usage, to be an important source of law. If foreign legal thought was adopted it was only those principles suitable for, and consistent with, an Islamic country.

The Judiciary.

An essential element in the new courts was the judiciary. It was the guarantee of irremoveable judges[38], chosen on ability from Egypt and abroad, and appointed by the Khedive[39], that was a major factor in raising confidence in the plans for reform, and it was these new judges from many varied backgrounds who had to interpret and apply the Mixed Codes to mixed cases. It is probable that the very divergence of background and nationality meant that the judges were united as a judiciary of the Mixed Courts and not, for example, as French, Italian, or Belgian judges. In applying their experience to the Codes they quite naturally interpreted them for Egypt and therefore set the seal on the Mixed Codes as Egyptian laws. By building up a solid body of case law they created something that can be identified easily as Egyptian law, regardless of what original base or influence may be discerned.

The judges had a good reputation. Ordinary Egyptians regarded them as bringing a new ideal of justice in place of an arbitrary system of decision, and they were broadly viewed as relaxing the letter of the law to find a spirit in harmony with local conditions[40]. The Egyptian and foreign judges working together were quite capable of deciding the cases before them, and were aided by the wide-ranging article discussed above that entitled them 'in the case of the

silence,insufficiency,or obscurity of the law' to judge the issue according to 'natural law and the rules of equity'[41]. As a consequence of this helpful article the judges used their skills to develop principles in many fields,such as patents and trademarks,and their background and experience played a significant part in forming these respected additions to the written law as set out in the Codes.

The first five judges were appointed on June 24th. 1875 to the Court of Appeal,and were Lapenna,Barringer,Giaccone, Koumani,and Scott.Dr.Aloyse Lapenna had been a judge of the Viennese High Court;Victor Barringer was the Attorney-General of North Carolina;Giovanni Giaccone had been a judge of the Italian High Court;Alexis Koumani was a Counsellor of State of the Russian Empire;John Scott was an Englishman who had practised as a lawyer in Alexandria for some time.The Khedive later appointed others to join the first:Horace Letourneux,appointed on February 8th. 1876,from the Court of Appeal in Algeria;and Nicolas d'Abaza,from Russia,appointed on March 30th. 1876,from the Court of Appeal at Tiflis.The first Egyptian Court of Appeal judge was Mohamed Kadry Bey, appointed on June 24th. 1875 from being Chef du Bureau in the Ministry of Foreign Affairs[42].All of these served with distinction.

The above judges were backed up by an equally sound first instance,or District Court,judiciary.The first to be appointed, with their dates of appointment in parentheses, were:Frances Hagens,from Germany(24.6.1875),a Judge of the Royal Court of Berlin;Alfred Bargehr(24.6.1875),Secretary of the Austro-Hungarian Imperial Ministry at Constantinople;Guillaume de Brouwer,from Belgium(24.6.1875),a Deputy Procureur du Roi, Bruxelles;Juste-Jean Halten(15.4.1876),Secretary at the Danish Ministry of Foreign Affairs;Emilio Olloqui(4.4.1880), Prefect of Caceres Province,Spain;George S Batcheller(10.11. 1875),a New York lawyer and member of the Legislative and Judicial Committee of New York State;Jules Herbaut(27.4.1876), President of the Court of Argentan,Orme,France;Prince Alexander Mourousi(24.6.1875),attaché at the Russian Imperial Embassy,Constantinople;Herbert Hills(10.11.1876),an English

lawyer;Nicolas Sacopoulos(24.6.1875),the Greek Consul at Constantinople;Guiseppe Moriondo(24.6.1875),a Consul-Judge of Italy at Constantinople;Peter van Bemmelen(24.6.1875),a Judge at Leyde Court,Holland;and Baron Magnus d'Armfeldt (24.6.1875),Procureur,Royal Court of Cassation for Norway and Sweden.It can be seen that they brought to Egypt a breadth of experience and differing cultures.

The first Egyptian District Court judges were Mohamed Chimy Bey,Governor of Port Said,Osman Orfy Bey,Deputy Director of the Customs Administration,and Ahmed Ebbed,Chef du Bureau at the Ministry of War,all appointed on June 24th. 1875.

The considerable degree of experience enjoyed in their own countries,together with the status they were granted in Egypt,combined with the laws that they had to apply,allowed the judges to exercise the independence of spirit and judicial thought intended by the reformers.It must be emphasised that the foreign judges were neither the representatives of their governments nor appointed by them.The foreign judges were appointed by the Khedive and completely independent of their home government,though naturally their fellow citizens may have felt more secure knowing that one or more of their countrymen was on the bench of the courts. Nevertheless,the appointments were by Egypt,and the contact of Egypt and the foreign governments when judges were selected was simply to enlist the aid of the relevant Ministry of Justice in drawing up a list of suitable candidates[43].

Apart from legal qualifications,a working knowledge of French,Arabic or Italian was required because these were the official languages of the courts[44].Although the total requirements were high,given the desirability of previous judicial office and the knowledge of languages,the fact of an excellent salary and a high status in Egypt far outbalanced the strict rigours of the profession and the country[45].

Not even these highly qualified judges however were expected to decide commercial disputes without assistance.For all commercial cases the courts sat with two merchants,one foreign and one local,who were entitled to vote in the cause[46].

They were chosen from lists of assessors elected by vote. In Cairo,24 were elected by the consular corps from lists drawn up by each consul,and in Alexandria 24 were elected from lists prepared by the financial,industrial and commercial community.In fact few of the electors voted in Alexandria,and most assessors who stood appeared to be successful[47].The Egyptian assessors were chosen by the Governor of Alexandria,and the Governor of Cairo,or the Moudir of Mansourah,and named in a Royal Ordinance.

The purpose of the assessors was to bring a practical view to the judging of commercial disputes,and they were able to advise on technical and procedural matters.Their position gave great confidence to the merchant community and the institution was very successful.

The Mixed Court Bar.

It was relatively easy to attract qualified and experienced judges to Egypt,but it was not so easy to do the same with lawyers to plead before them[48].The nature of a lawyer's profession in Egypt,where there was no guarantee of work or payment,and little financial security to attract foreign lawyers away from their countries,militated against movement to Egypt.Nevertheless,many foreign lawyers did arrive for the opening of the courts,and they were mostly French, Belgian,Italian,Greek and Swiss.They were qualified lawyers and their legal knowledge was in sharp contrast to the practitioners who had had charge of cases before the Consular Courts and the unsuccessful Commercial Courts.

These were known as mandataires,and were an unrecognised and unregulated body of agents who took cases on behalf of litigants for a fee.The inter relation of the two groups, qualified lawyers and unqualified agents,was solved by insisting that only properly qualified lawyers pleaded before the Mixed Court of Appeal,with mandataires restricted to the other,lower,courts.In 1887 mandataires were restricted to the Summary Courts,and in 1892 were prohibited from practice altogether.Restriction of this right of audience in the Mixed Courts was linked to the development of a qualified Mixed Court Bar able to take on the work of advocacy and drafting without recourse to mandataire assistance.

From the first General Assembly of the Bar,called by the President of the Court of Appeal on March 20th. 1876 and held to form a Bar Association(the Barreau),the Bar contributed to the jurisprudence of the courts by providing an educated group of lawyers,able and willing to present concise authoritative legal reasoning in their arguments before the courts,both in written opinions and advocacy.The Bar was also a professional self-regulating body.

Several requirements were later made for lawyers:
1.A legal diploma;

2.Good character;
3.Residence in Egypt;
4.Three years in training in a lawyer's office.

In 1875 however the only requirements were the possession of a legal diploma and the establishment of good character. It is worth noting that this was in itself enough to raise the standards well above the other Egyptian tribunals.

The organisation and discipline of the Bar was what could be expected in any properly administered profession.The requirement of a good character was clear,but despite this a bankrupt merchant did apply to be admitted in June 1876, but he was not accepted[49].The Bar jealously guarded its status,and from the beginning ensured a high standard of integrity and honesty.While standards were being established the question of other professional work became important.

Many lawyers had commercial or financial interests in business and publishing ventures,and some were honorary consuls.A rule developed of sole allegiance to the Bar, and incompatible activities were not allowed[50].The over-riding principle was one of a first and foremost duty to the profession of lawyer,and the activities of a consul, for example,were incompatible unless the post was purely honorary.Paid employees were not allowed to remain or become lawyers[51].

These rules inevitably channelled the Bar's activities into purely legal fields of writing and giving conferences on legal topics,and indirectly therefore assisted the wealth of legal material that became available.This included extensive commentaries on the codes,a weekly and monthly report of cases,and occasional papers[52].In this way and through the advocacy of the cases the Bar was a vital factor in the jurisprudence of the Mixed Courts.

Foreign lawyers who had been called to their own Bar for at least five years had a right of admission,and visiting lawyers were permitted to plead in certain cases.In short, the Mixed Bar was as flexible as necessary in the cosmopolitan context of Egypt.

One factor remains to be discussed.The Mixed Courts were self financing and fees were not subsidised by the Egyptian Government.Compared to the average income of the country they were thus an expensive resort.As a measure of relief for parties who could not afford to take a case to court,or to defend it,the Bar organised a highly efficient scheme of legal aid[53],so that lawyers shared in the task of representing poor clients for nothing.

The requirements for benefitting from this aid were first, that a state of poverty existed and,secondly,that on balance there was a likelihood of a favourable decision.This latter provision prevented frivolous and time-wasting applications, and the former requirement of poverty was satisfied by a certificate from the consulate if the party was a foreigner, or from the local authority if he or she was Egyptian.In addition to the free services of a lawyer the poor party was exempted from all other costs and expenses,so that the trial cost him nothing at all.

As a result the Mixed Courts did not simply deal with those cases where large sums and/or wealthy clients were involved, but with a whole range of disputes covering all manner of issues.By the granting of free legal aid they viewed a much wider range of cases than would otherwise have been so, and were therefore able to influence all reaches of Egyptian legal affairs.This simple provision,intended doubtless as a gratuitous and charitable act,in fact increased the influence of the Mixed Courts,and made sure that their jurisdiction was not restricted by the means of the parties but solely by the question of a mixed interest.

The Organisation of the Courts.

The efficient working of the courts was seen to be important in 1873. A foundation was duly laid for a highly organised administration to provide a secretariat for the judiciary, and to keep records of the cases.

Each District Court initially had seven judges, of whom four were foreigners and three natives. Each sitting, or chamber, was of three judges, two foreign and one native, and in commercial matters two assessors, one foreign and one native, sat with the judge[54]. The Mixed Court of Appeal, the superior court of the system, had eleven judges, seven foreigners and four natives, and decisions of this court were given by five judges, three foreign and two native[55].

To assist these judges each court had a number of officials attached. Greffiers, or registrars, were appointed [56] to be in charge of all the paperwork and general administration. They listed the cases, supervised the trial, and formally published the results, countersigning the presiding judge's signature. A high standard was required for these officials, and in the first years of the courts they were appointed from people who had served in the same positions abroad. As an indigenous group of qualified officials developed the appointments were made from amongst those applicants resident in Egypt, though a number were still foreign nationals.

The greffier had to be 24 years old, pass difficult examinations in law, and be approved by a committee of the judges and the chief greffier. A good knowledge of at least Arabic, Italian or French was required, and most spoke at least two of these languages. In addition to the purely judicial work of the courts the greffier later took on the responsibility of deeds and other notarial acts, as part of a juridiction gracieuse[57]. To assist these registrars there was a staff of office workers, mainly copyists, typists, clerks, clerical assistants and messengers.

The next category of staff was the huissiers[58]. These were a mixture of bailiff and usher, assisting the courts in their

trials,and executing the resulting judgements.They had to be 24 years old,and pass certain basic tests,essentially to prove that they could read and write at least one of the judicial languages.Huissiers also had to provide a guarantee, in cash or government securities,to allow for any claims made against them in their official duties.

The third major category of employees was the interpreters[59]. They too were required to be 24 years old,and perfect in arabic and one other judicial language.Their role was to assist the courts in dealing with the many different nationalities,and they were a useful addition to the staff.Their work was mainly with the litigants,especially the poorer foreign nationals,because most greffiers,huissiers,and judges were able to speak or understand more than one judicial language.

Finally,the Mixed Courts had their own guards,caretakers and messengers[60] to complement the staff already mentioned.

By any standards the organisation was good.In comparison with the rest of Egypt's judicial system in 1875 it was almost unbelievable,and intense competition for staff places resulted in a high standard of work.The administrative machine of the Mixed Courts was the model for the Native Courts administration,and the smooth running of the Mixed Courts not only provided a spur for the Native Court's administration,but also helped to ensure speedy as well as fair justice within itself.By keeping meticulous records of decisions and cases the judiciary and the Bar were never short of precedent and judicial example to assist them in formulating opinions or reaching decisions.This record of all cases and parties before the courts created a useable fund of information,and enabled the system to utilise previous authority in developing new ideas and answers to developing legal problems.

The Parquet.

This was an institution copied from continental countries. It can be described in terms of a magistrature debout, to indicate that its members, while accorded the same respect as members of the judiciary proper, were not decision makers in a case, unlike the magistrature assise.

The Parquet, under its head the Procureur Général, had two functions. The first was to prosecute on behalf of the state. Due to the restricted criminal jurisdiction of the new courts this role was limited to issues involved in the running of the courts themselves, and supervision over police offences. The second, more important, function was as the guardian of public order, that is the general good of the state. This entailed a supervisory aspect over all litigation in case a matter of public interest arose. If it did, the Procureur Général had the right to intervene in the case and put his point of view as a Ministère Public. This intervention was made compulsory in certain classes of action, such as cases regarding minors, or the recovery of dowries by wives[61]. It should be stated though that it was not the task of the Procureur Général to conduct litigation on behalf of the Egyptian Government; that was left to the lawyers employed by the Government in the legal office known as the Contentieux.

The Procureur Général was a figure of importance. The post was held by a foreigner, not as a matter of formal agreement but as a matter of understanding between Egypt and the Capitulatory Powers. At the start of the courts the post was given to a Belgian as a means of avoiding diplomatic arguments between the larger nations. The Egyptian Government appointed the Procureur Général and his staff, and it was under no agreement to consult with foreign governments over its choice. It is likely however that the Government did so for the same reason as it did, by agreement, when choosing judges for the courts, so that it was able to select from a wide overseas list prepared by the foreign governments called upon by Egypt.

The status of the Parquet was high.In addition to the work of the Procureur Général,certain officials were attached to the Parquet as Inspectors,and these ensured that the proper administrative work was done correctly.This supervisory function of the administration thus provided an independent control of the system,in addition to the control of the administrative head,the Greffier en Chef.

All in all the Parquet,both as Ministère Public and as a supervisory body,contributed well to the Mixed Courts.This was largely due to the quality of the people first employed. As an example,the first Procureur Général was Adolphe de Vos, a Belgian,who had gained experience as the Procureur du Roi at the Court of Bruges.He had actually been appointed a judge of the Cairo District Court on February 8th. 1875, but was then appointed Procureur Général on May 13th.1875.

Vos was followed by Gilbert Vacher de Montguyn,appointed on January 23rd.1879,who had been a substitut(deputy),and who before then was the Procureur de la Republique at the Cour d'Assises des Basses-Alpes.The next was Francois de Sigoyer, a judge of the Bordeaux Court of Appeal,appointed on February 2nd. 1889.Among the substituts were Tilo de Wilmowski, Judicial Assessor at Berlin,and Antoine de Korizmics,a Hungarian judge,both appointed on June 24th. 1875.There were frequent changes between the Parquet and the Judiciary proper, so that many Procureurs and substituts became judges and vice versa.This interchange helped to form a close professional bond between the two divisions.By far the greatest number of substituts were in fact Egyptian,but their background is difficult to ascertain,save that many also became District or Court of Appeal judges.

Egyptian Sovereignty and the Mixed Courts.

Were the Mixed Courts in any way a derogation of Egyptian sovereignty?The question is important because it raises another question as to the involvement in,and contribution to,Egypt's legal system.

If,as has been claimed,the courts were 'international'[62], that is to say imposed on a reluctant Egypt,administering law on behalf of the foreign Powers and for their benefit, the wealth of laws and jurisprudence built up over the years would only be of passing interest,and not part of a whole,Egyptian,legal system.It is submitted that the international theory is completely false.The Mixed Courts were Egyptian Courts,giving justice according to Egyptian laws, in the name of the Egyptian ruler,to the residents of Egypt. It is important to remember that the judges were appointed by the Khedive and rendered justice in his name[63].It was Egypt which approached the Capitulatory Powers with proposals for legal reform,and it was Egypt which maintained the pressure for reform until the plans were accepted.Indeed, Ismail inaugurated the new courts in the absence of French approval,but this did not prevent their successful opening. If the courts had been international,owing their authority to forces outside Egypt,it would have been Egypt under pressure to accept them,and not vice versa.

Clearly then the courts were Egyptian,and their jurisprudence and laws were an Egyptian contribution to Egypt's legal history.What,though,of the status of Egypt vis-a-vis Turkey?In 1875 Egypt was still a part of the Ottoman Empire[64], but since the 1873 firman permitting free negotiations with the Capitulatory Powers for,inter alia,judicial reform there was no restriction from the Ottoman Empire on Ismail's legal powers within Egypt.

In its correct light Egypt,having been bound previously by the Capitulations,and by custom and usage,to observe certain procedures and allow delegated legislation and authority to the consular representatives of certain foreign Powers,now

agreed, again by treaty[65], with those Powers that their nationals would be subject to the Mixed Courts as outlined in the new codes.

Whether the old consular courts are seen as the exercise in Egypt of delegated jurisdiction from the Egyptian sovereign, or as a true extra-territorial power[66], the new courts were not a derogation from Egyptian sovereignty.

Either as the realignment of previous treaty concessions, or as a purely Egyptian court system, the courts were Egyptian courts. Thus since Turkish laws were no longer applicable in Egypt because she had her own, and because relations with foreigners were put on a sounder and more overtly Egyptian footing, the Mixed Courts enhanced Egyptian sovereignty rather than diminished it. They were a retrocession of rights from the Capitulatory Powers to Egypt.

None of the provisions of the Codes took any power away from the Khedive, and in so far as the courts were able to pronounce judgement against the Khedive, this was an extension he had approved and put forward which did not cover public sovereignty, and which was in keeping with the principle of restrictive sovereign immunity.

It is worth bearing in mind that Egypt regarded the Mixed Courts as entirely in keeping with the dignity of the Khedive. Cherif Pasha, the Judicial and Commercial Minister, said at the inauguration: 'In bestowing the mandate of giving justice in his name, the Khedive entrusts to the wisdom, loyalty and honour of the judges, one of the most important attributes of power'[67].

In addition the Khedive was free to pass what internal legislation he chose for foreigners and natives, provided that no specific Capitulatory privileges were affected[68]. This could not have been so if the Mixed Courts and foreigners in Egypt were both under foreign control. In short, from the establishment of the courts, promulgation of the Codes, sitting of the judges and execution of the judgements, all was done in the Khedive's name and with his authority. The Mixed Courts were a vital part of Egypt's judicial system, and generally accepted as such[69].

Notes to Chapter 2.

1.Decree 28.12.1875,Art.4,Plan II;minor amendments were later made.
2.Art.9,Règlement d'Organisation Judiciaire,hereinafter referred to as ROJ in the notes;'les actions réelles immobilières'-thus all actions regulating real property, no matter if classified as real or personal as actions;this followed Art.7 of the Italian Civil Code,and the firman of 16.6.1867 allowing foreigners to own property subject to local laws;Art.5 Mixed Civil Code(MCC).
3.Art.10 ROJ;Art.6 MCC.
4.Art.11 ROJ;Art.7 MCC.
5.Art.12 ROJ;Art.8 MCC;these were claims against wakf property,as well as other religious endowments or trusts not called wakf.
6.Art.13 ROJ;Art.9 MCC-this could have been understood by Art.5,see note 2 above.
7.Brinton,op.cit.,p.115.
8.Art.6-Art.10 ROJ,Title II.
9.Art.7 ROJ(II):(a)Outrages par gestes,paroles ou menace. (b)Calomnies,injures,pourvu qu'elles aient été proférées soit en présence du magistrat,du juré ou de l'officier de justice, soit dans l'enceinte du tribunal,ou publiées par voie d'affiches,d'écrits,d'imprimés,de gravures ou d'emblèmes.
10.See Livre d'Or,op.cit.,p.84(article by Messina),where it is stated that Egypt needed new codes of a latin type because of her situation,and so went to a French base because latin codes were from that same base,and for no other reason.
11.In Walton,The Egyptian Law of Obligations,Vol.I & II,1920, London,Stevens & Sons,the French,Egyptian,Quebec and English codes or laws are compared.Walton considered the Egyptian codes a great improvement on the French in many areas where their provisions are similar.He also frequently cites examples where the provisions are clearly different because of Moslem law.Interestingly,he states in Vol.I p.iii that a commentary on the Egyptian codes is a commentary on the French codes with an indication where they are different.This is in apparent contrast to the general text of both Vol.I & II.

12.Art.4 MCC defining personal status is equivalent to Arts.6/8 of the then Italian Civil Code,relying on a theme of personality of the law;note that bankruptcy was not a question of personal status,which was an Italian idea and not in tune with French views at the time.
13.Art.93-101 MCC;these articles were later repealed by a Decree of 26.3.1900,and replaced in similar terms in the Decree.
14.Art.55-58 MCC;a French rule was rejected by Art.59,and a further difference added by Art.60.
15.Art.51 MCC;more exactly this was also 'd'après les usages locaux',and covered water rights,windows overlooking women's quarters,and other traditional Islamic rules.
16.Art.387-400 MCC;there was no such distinction in French law.
17.Art.662-677 MCC;treated as a sale with a power of redemption.
18.Art.564-589 MCC;it must be said that there is nothing particularly unique about these rules as to loans.
19.Art.330 MCC;this was similar to Art.383 of Kadri's Hanafite code,see Chapter 5 note 49 & Chapter 6 note 41.
20.Art.371-373 MCC;this was contrary to Art.1138 of the French Civil Code.
21.Art.315-318 MCC;these articles made such sales voidable at the buyer's option unless it was agreed that he knew sufficient about the goods beforehand.
22.Regarded as legacies,wasiyya;Art.320-323 MCC.
23.Manfa'a;see Art.29-50,Art.447 MCC;Art.29 can be contrasted with Art.578 of the French Civil Code.There was no obligation in the Mixed Codes to conserve the substance of a trust.
24.Art.358 MCC.
25.Art.362 MCC.
26.Art.190 MCC.
27.Bestawros,Code Civil Egyptien Mixte Annoté,1929,Paris, Lib.Gén.de Droit et de Juris.;Halton,An Elementary Treatise on the Egyptian Civil Codes,1911,Cairo,National Printing Dept.; Holt,op.cit.,(article by Anderson)-all discuss at various times these and other origins of the 1875 Codes.

28.Brinton,op.cit.,p.87;McIlwraith was a Judicial Adviser to the Egyptian Government and made his comments in a lecture at Cambridge in 1924.
29.Amos,Code Napoleon and the Modern World,JCL&IL,3rd. series,1928,Vol.10,pt.I,p.235.
30.W.Brunyate,a Judicial Adviser,stated that he had found, over 20 years' experience,that few of the principles were really different in English and French law-Judicial Adviser's Report,1916;an American judge in the Mixed Courts,Grant Van Horne,frequently expressed the same view,see Brinton,op.cit., p.88 note 7;this must be taken to refer to those principles as used in Egypt,for clearly there are different attitudes and procedures between English and French law.
31.Hassan Boghdadi,La Distinction des Statuts Personnel et Réel en Egypte,1937,Cairo,reviewed by Goadby,see AJIL,1938, Vol.20,p.150;Halton,op.cit.,Vol.I,p.227 states that Italian and Belgian law influenced Obligations,and Italian law influenced servitudes,see also p.xxi;the Italians felt that their influence was even wider.Mancini,an Italian judge, reported to the Italian Parliament on 20.3.1875:il codice egiziano dilungandosi dall'esempio del maggior numero,adotto invece il sistema italiano-Boghdadi,op.cit.,p.201.
32.Mostafa,Evolution de la Procedure Pénale en Egypte,1973, France,Presse Univ.de France,pp.40/41;Wathelet & Brunton, Codes Egyptiens,1919,Bruxelles,Larcier,Vol.I p.597-623;no doubt this was an attempt to persuade France to agree to Egyptian criminal jurisdiction over her nationals,which was consistently refused.
33.Saroufim,England and the Criminal Legislation of Egypt, from 1882,1949,Oxford Thesis,Introduction & Chapter 2;the reasons for apparent French influence are described in this detailed work.It is Saroufim's view that Egyptian criminal law and its development owes a great debt to English law and very little in comparison to French law.
34.Promulgated 16.9.1875 for 15.10.1875;drafted for and accepted by the International Commission in 1873.Manoury was reputed to have received £10,000 for the work of drafting-Amos,Legal Administration in Egypt,JCL,1930,Vol.12,p.168.

35.Attitudes amongst the judges of the Mixed Courts did vary. Some saw the Codes as saved only by inspired interpretation of the judiciary-Livre d'Or,p.85(Messina),trans.:The Codes are imported and strange...sometimes ingenious adaptation,or summaries,incomplete,of foreign type European codes'.Others viewed them as'a highly creditable achievement...stood well the severe test of daily use,and furnished an admirable basis for the progressive development of the law'-Brinton, op.cit.,p.86.

35A.Art.34 ROJ;Art.11 MCC.Contrast Art.5 French Civil Code.

36.Art.3,2:si decidera secondo i principii generali di diritto.General principles of law being interpreted as natural law and equity-Messina,Traité de Droit Civil Egyptien Mixte,Vol.I,1927,Cairo,C.Molco,p.234.

37.Art.1-the judge could,in the absence of a specific provision,decide 'selon les règles qu'il établirait s'il avait à faire oeuvre de legislateur',i.e.as if he were legislating anew-Messina,op.cit.,p.49.

38.Art.19 ROJ;this irremoveability was for each period of agreement for the courts,and did not prevent the disciplining of judges by the Court of Appeal(Art.138-Art.161 ROJ).The courts were agreed in periods of five years initially.

39.Art.5 ROJ;see note 43 below.

40.Livre d'Or,p.497(reprint of a talk by Bâtonnier de Semo).

41.Art.34 ROJ;Art.11 MCC,see note 35A above.

42.He was appointed Minister of Justice 14.9.1881,after having been in charge of codifying the Hanafite school of personal status law.

43.Art.5 ROJ;La nomination et le choix des juges appartiendront au gouvernement égyptien;mais,pour être rassuré lui-meme sur les garanties que présenteront les personnes dont il fera choix,il s'adressera officieusement aux Ministres de la justice a l'étranger et n'engagera que les personnes munies de l'acquiescement et de l'autorisation de leur gouvernement;and see Brinton,op.cit.,p.46.

44.Art.16 ROJ;English was only added in 1905 by Law no.12, see Chapter 5,p.154.

45.Brinton,op.cit.,p.51;my research indicates that the salary of Egyptian judges has remained the same since 1949,when the Mixed Courts were amalgamated with the Native Courts to form the National Courts,to whom all work was transferred.
46.Art.2 ROJ;see Livre d'Or,p.283-287(article by Pegna,who was a juge-assesseur in Alexandria);Maakad,op.cit.,p.16;see note 55 below.
47.Livre d'Or,p.283-287.
48.Art.175-Art.219 ROJ;Brinton,op.cit.,p.144;Maakad,op.cit., p.37-44;Livre d'Or,p.217-226(article by Jules Catzeflis).
49.Livre d'Or,p.219.
50.This principle matched the English Bar,then and now,and was in line with continental requirements.
51.Art.198 Règlement Général Judiciaire(General Rules), referred to in notes as RGJ:Sont incompatibles avec l'exercice de la profession d'avocat:(a)Les fonctions d'un emploi salarié par l'Etat,excepté les fonctions de professeur de droit;(b) Toutes autres occupations qui répugnent à la dignité de l'ordre des avocats;Livre d'Or,p.223.
52.Much of this material has,sadly,been lost,though references to it can be found in some of the remaining material,and originals are occasionally found.
53.Art.239 RGJ:L'assistance gratuite des pauvres est une charge honorifique et obligatoire de l'ordre des avocats;the provision of legal aid was detailed in Art.239-Art.251 RGJ.
54.Art.2 ROJ.
55.Art.3 ROJ;no assessors sat in the Mixed Court of Appeal.
56.Art.6 ROJ.
57.Art.24 & Art.26 RGJ.
58.Art.7 ROJ;Art.27-34 RGJ.
59.Art.7 ROJ;Art.35 RGJ.
60.Art.44 RGJ.
61.Art.68,M.C.Civ.Proc.;Brinton op.cit.,p.57.
62.Milner op.cit.,p.59,talks of the courts as a stronghold of foreign influence,deriving their authority from outside Egypt.Numerous other observers also refer to the courts as 'international'.The phrase 'international courts' is used, strangely,on the memorial plaque to George S Batcheller,a

judge of the Mixed Courts,in St.Mark's Church,Alexandria. Dicey,Egypt of the Future,1907,London,Heinemann,p.57,also states that the courts were international,and were established as an international authority against the autocratic power of the ruler.This is clearly incorrect.See also,Twiss,The Law Journal,1883,Vol. 18 ,p.335 .Contrast the statement by Renton, AJIL,1933,Vol.15,p.216,that the Mixed Courts were not international as in Shanghai or Tangier.

63.Art.5 ROJ;see note 43 above;nomination and choice of judges shall belong to the Egyptian government.

64.In The Charkieh(1873) LR 4,Ad.& Ex.Cts.59,it was decided that Egypt was still a 'vassal state',and the Viceroy 'a subject prince' of Turkey.Among the reasons were that the Egyptian army was part of the Ottoman army,taxes were levied in the name of the Ottoman Porte,treaties of the Ottoman Porte were binding on Egypt,and the Ottoman flag was used for the Egyptian army and navy.

65.In the manner of the Règlement d'Organisation Judiciaire pour les Procés Mixtes en Egypte,1875,accepted by all the parties as the basis of the courts.It was regarded as a treaty: O'Rourke,The Juristic Status of Egypt and the Sudan,1935, Baltimore,John Hopkins Press,p.83.

66.It seems certain that Great Britain viewed the consular jurisdiction as delegated.The preamble to the Ottoman Orders in Council stated that consular jurisdiction was based on treaty.Note the American case regarding consular courts in Yokohama,Japan,In Re Ross,US Supreme Court,1890,140 US 453. O'Rourke,in op.cit.,regarded the Mixed Courts as an escape from the extra-territoriality of the consular courts.There is a general discussion on this point in Hall,A Treatise on the Foreign Powers and Jurisdiction of the British Crown, 1894,Oxford,The Clarendon Press/Stevens & Sons.

67.Livre d'Or,p.474(trans.),28.6.1875,Official Minutes.Nubar Pasha,responsible for the negotiations,had been dismissed.

68.Briefly discussed,Brinton,op.cit.,p.89-90.

69.Even by the English Courts during the British Occupation and Protectorate,see Casdagli v Casdagli(1919) AC 145,at p.153, and generally.

CHAPTER THREE

1875 TO 1885.

Introduction.

The Mixed Courts started amidst wide publicity and hopes.They were started in a country where the laws were mostly the servants of the paymasters of the tribunal called upon to apply them.The courts of The Reform began to show that law must be a generally abstract rule,and could not be subordinated to the temporary exigencies of the ruler,a point later discussed at length by Sanhouri in his writings[1].This approach may loosely be called jurisprudential,and something which Egypt was not used to at all.

The first section of this chapter deals with The Independence of the Mixed Courts from the Khedive Ismail,especially the Khedive's debts and his deposition.This leads to The Caisse de la Dette Publique,the British Occupation,and the Native Courts,describing the financial problems of Egypt,the failure of the Caisse de la Dette Publique to raise sufficient money,the consequent internal strife and resultant British Occupation, together with the establishment of the Native Courts in 1883. The section also looks at the role of the British consul.The chapter continues with General Jurisprudence.One important question to be answered was who was a foreigner?The necessity of seeking an answer provided a base for defining nationality and citizenship,and also extended to foreign involvement in companies.Was an Egyptian company within the jurisdiction of the Mixed Courts?Thus began the debate on mixed interest as a ground for jurisdiction.

After a further general discussion,including judge-made law,the chapter goes on to discuss the role of the Mixed Courts as a court of claims against the Egyptian Government,followed by the Mixed Courts' Administrative Influence,and a Conclusion.

The Independence of the Mixed Courts from the Khedive Ismail.

The first years of the Mixed Courts were a time of judges, mostly newly arrived in Egypt,feeling their way through the new codes and the disputes submitted to them.At the same time,political and economic events interacted with legal issues,so that in the first ten years of the courts' existence,and thus the first nine years of decisions and jurisprudence,the independence and solidity of courts of law were shown to a degree not seen before in Egypt.

There were several cases of major importance,and many of small individual note,which together make up the first strands of a true Mixed Courts and Egyptian jurisprudence.

The Khedive's debts.

The most important issue so far as independence and stability were concerned was that of the Khedive's loans. Ismail had,in an effort to push Egypt into a modern state, contracted huge loans with a variety of creditors.Some of these latter had forced very onerous terms on him,and all had taken advantage of the fact that as he was nominally under Ottoman sovereignty,his right to contract loans with foreigners on the security of Egypt's revenues was very doubtful.Thus a higher rate of interest was charged than would otherwise have been the case,and often the capital advanced was much less than that to be repaid.In addition,the Khedive had to pledge his personal assets and estates as security,and the status of the loans was confused.Were they loans to Ismail as Khedive,that is as the sovereign internal authority of Egypt,for public purposes and therefore akin to loans to governments?Or were they loans to Ismail as the owner of vast estates,on a purely private basis?Ismail used the money for both purposes,and in so doing did not distinguish clearly between the two.So far as he was concerned,Egypt was within his personal control,and thus a loan to him was a loan to Egypt and vice versa.This confusion between public and private debts would have caused difficulty in litigation

because of the question of whether the courts had jurisdiction over matters of sovereignty had it not been for the provision in the codes that,in disputes with foreigners,the Mixed Courts were competent to decide matters relating to the government,and the Khedive's land and that of his family[1A],so long as no question of acts of sovereignty arose[2].Thus the Khedive's loans were within the jurisdiction of the Mixed Courts,and within a few months of the new courts' opening,the first cases on these loans were heard.It was perhaps ironic that the first test of the new courts came in relation to their founder, but in so doing the test was passed.Treating the Khedive as no more than a party to an action,the judges proceeded to hear and decide the cases on their merits.

The 'Affaire Carpi' was decided by the Mixed Court of Appeal on the 3rd.May 1876.Cesare Carpi was the holder of two Bills of Exchange drawn by the Daira Sanieh(The Khedive's Upper Egypt estates)on the Minister of Finance,and accepted by him.The Bills were due to mature in May but a Decree of the 6th.April postponed payment of all the Khedive's debts due in May for three months.This was an attempt to use the Khedive's public authority to delay payment of his private debts or,even if it could be argued that the debts were public rather than private,they were still justiciable before the Mixed Courts in relation to foreigners by virtue of the express provisions of the codes.The Mixed Court of Appeal had no difficulty in deciding the case in terms that the debts must be paid as originally agreed.

The Carpi case was the first of many[3].The courts considered the issues and gave judgement accordingly,and in time a sizeable number of decisions against the Khedive had built up.So far,the courts had shown themselves to be firm in their purpose,and quite prepared to give judgement in the Khedive's name against his estates and family.The real problem was that the judgements were of no practical consequence without enforcement,and the Government refused to allow its officials,whether civilian or military,to assist the employees of the Mixed Courts in enforcement against the Khedive.This was a most serious state of affairs.Of what use were empty judgements?Even more serious was the deliberate

breach of the agreement to allow the courts to enforce their own judgements by their huissiers,with the assistance of the local administration[4].The potential danger was two-fold.On the one hand the foreign powers,especially those who had given up Capitulatory rights in exchange for the Mixed Courts,rightly saw this obstruction by the Khedive himself as reducing the power of the courts to stabilise all of Egypt's disputes with foreigners.On the other hand the local Egyptians,having seen the example of a strong and independent judiciary prepared to condemn their own Khedive to pay his debts,saw that the reality was that if their ruler did not like the law he simply ignored it,or purported to change it to his benefit.It was some years later(see next chapter)before any agreement was made between Egypt and the Capitulatory Powers as to the Khedive's rights to legislate in relation to foreigners,but no doubts were entertained at the time as to the unacceptability of decrees unilaterally extending agreed loans.

The problems gathered a serious momentum .A short while after the suspension of his debts for three months Ismail announced,on the 2nd.May 1876,that his debts and those of Egypt were one and the same,and would be known as the Unified Debt,paying 7% interest per annum,with prolonged capital repayments.This caused a great deal of confusion in the commercial community,and creditors pressed forward their claims in the courts regardless.The Mixed Court of Appeal had,however,suspended execution of the Carpi judgement till the Khedive had had a chance to discuss his debts with the Capitulatory Powers and,following suit,the District Courts gave judgement against Ismail but suspended execution.

Ismail then began a long series of negotiations with his creditors over repayment.He even claimed that he was unaware that the codes he had proposed really meant that his arrangements with foreign creditors were within the Mixed Courts' competence[5],but all this was to no avail.Over the next three years case after case went against Ismail,until eventually diplomaticpressure changed the situation.Before that though, an attempt had been made to enforce a judgement obtained on behalf of a foreign bank against a Royal Palace in

Alexandria,where one of the Princesses lived.The huissier was given the writ of execution and went to the Palace, only to be rudely ejected by the eunuch guards.He called on the Governor of Alexandria for troops to enforce the writ[6],but soldiers were sent to the Palace to guard it against the huissier,rather than to assist him.Faced with such a practical impossibility the writ was suspended by Moriondo,the President of the Alexandria Court.

Another attempt at enforcement was made in the Goldschmidt, Keller,and Lucovich case[7].These parties applied for a writ of execution against the assets of the Finance Ministry, and tried to seal judicially its cash-boxes.The move was not successful.The courts made it clear that while in general the administration of the government was morally obliged to observe the laws and decisions of the Mixed Courts its assets,being government property,were not ordinarily liable to seizure.It was up to the creditors in each case to show an exception to this principle,and this they had not done.At this difficult time in the Mixed Courts' history the judges were not prepared to declare as wide a control over government property as some creditors would have liked,but preferred to balance carefully their rights under the law with the general immunity of government.

Further complications arose in the attitude of the judges. The Egyptian judges were extremely reluctant to sit in courts that so readily condemned their sovereign against the terms of his decrees.Their argument was that rendering a judgement against the Khedive in these circumstances was tantamount to rebellion.Clearly,this charge could not have been upheld,and the Egyptian judges were as free as the other judges to decide cases as they saw fit within the codes.Persuading the Egyptians,who were used to an altogether arbitrary system of reward and punishment,that the unity of an independent judiciary was more valuable than political weakness,fell to Lapenna,the President of the Mixed Court of Appeal.He managed to persuade them to sit as usual after delicate negotiations[8].If they had not

attended the courts,the correct proportion of foreign and native judges would not have been maintained and no quorum established.Thus the entire system would have been halted by the absence of the Egyptians,but thanks to the support and persuasion of their foreign brethren this did not happen.

One Dutch judge,Jacques Haakman,of the Alexandria Summary Court,disapproved so strongly of the Khedive's refusal to allow execution against his assets that he declared in open court that he was no longer accepting cases for trial, and closed the court.His attitude was that a refusal of enforcement was a denial of fundamental principles,and he was adamant in his obstinate unwillingness to act.This unwillingness to carry out the tasks of a judge was incompatible with his obligations,and after a direct refusal to work was given by him to the Mixed Court of Appeal he was dismissed from office by its General Assembly sitting as a disciplinary body[9].

The Bar too were upset by the apparent impotence of the Mixed Courts.In January 1878 17 lawyers sent a letter to the Mixed Court of Appeal and the Consular Corps,complaining that judgements against the government were in fact nothing but an extra source of revenue for the government because of the court fees that had to be paid by the parties[10].Apart from this rather bitter public outburst the Bar,still in its formative years,took no further action.

Thus the scene was set for a diplomatic solution to the Khedive's debts.The whole crisis had been brought to a head by the Mixed Courts,who had masked the many inequitable loan agreements with the legitimacy of a court judgement. The final irony-that the reforming Khedive was a victim of his own reform-occurred in June 1879.Despite initial rearrangements and changes in the political structure, despite selling his Suez Canal shares and putting some loans into a new framework known as the Caisse de la Dette, Ismail was unable and unwilling to pay his debts.On the 11th. May 1879 the German Ambassador in London advised the British

Government that Germany viewed the Khedive's refusal to pay his judgement debts as an unacceptable breach of the obligations of the Reform.France too demanded payment exactly as due,and pressure grew on Britain to join against Ismail.The result was pressure on the Sublime Porte to exercise their sovereign right,with Europe's blessing,to remove the Khedive for breach of the Firmans granted to him and his predecessors.On the 26th June two telegrams were sent to Cairo,one dismissing Ismail and the other appointing his son Tewfik as Khedive of Egypt[11]. Ismail left Alexandria on the 30th.June for asylum in Naples.Though he had been a victim of his own creation,he also ensured its success.Observers were shown that the judgements of the Mixed Courts were to be taken seriously and no-one,not even the Khedive,was above the law.In making this point so early on in the history of the courts, a confidence and optimism pervaded the whole system,so that all those concerned with the administration of justice felt that something new and worthwhile had really been established.The example of judicial integrity and independence was all the more remarkable when contrasted with Egypt pre-1875,and was the foundation stone for a new justice in the whole country.For this reason the clash between the Khedive and his Mixed Courts assumed an importance that outlived the memory of exactly why Ismail was deposed,and was the first milestone in modern Egyptian legal history.

The Caisse de la Dette Publique, the British Occupation, and the Native Courts.

An attempt was made in 1876 to organise the Public Debt of Egypt on a sound basis. To this end, the Caisse de la Dette Publique (the Caisse) was established by Decree of the 2nd. May to receive the tax revenues from the provinces of Garbeyeh, Menoufieh, Beheira and Assiut, together with the excise duty from the customs houses, and the receipts from the Egyptian railways. This money was used to pay off the debts, and was controlled by Commissioners delegated, initially, from France, Austria and Italy. Their task was a difficult one. Although they were the Commissioners and thus responsible for paying bondholders and receiving revenue, they were still dependent on the Egyptian government to collect the money and pay it over to them. The Caisse was an international financial control that tried to administer a scheme designed to sort out Egypt's bankrupt position[12]. The arrangements were bedevilled by political problems, with France determined to protect its bondholders despite the obvious consequences of enforced payments. To prevent further problems, France and England entered into the Goschen-Joubert agreement of November 18th. 1876, for a new financial plan for Egypt. This was only partially successful because the Khedive and his debts, public and private, were so ubiquitous that only a completely unified financial control could hope to salvage the economy. By January 1877 the Foreign Office in Britain were being advised that the Commissioners were so short of money that they were paying the native cashiers (whose salaries were months in arrears) out of their own money to reduce the temptation for them to steal what money was still being received[13]. In this respect the Mixed Courts were powerless to assist.

The shortage of cash in the Caisse, combined with the cases discussed above, soon contributed to Ismail's downfall and Tewfik was able to play a more stable role in the economy by broadly following the advice of the foreign powers. The heavy burden of taxation was, however, the cause of rebellious discontent. The Khedive and foreigners became a focus for this and nationalists, especially Orabi, became a focus for

popular hope.The consequence of all this was the bombardment of Alexandria by a British fleet in July 1882, following a massacre of Europeans in the city,and the British occupation of Egypt after the rebels' defeat at Tel-el-Kebir in September 1882.It is worth noting in this respect that the records show that the business of the Mixed Courts continued as usual during this period of unrest,and no legal delays were causedby the rebellion.

The Occupation was to be the major factor in Egyptian political life for the next half-century.As such,its effect on the Mixed Courts was twofold.First,it reestablished order and the authority of the Khedive.In so doing the British military acted on his behalf,and in no way derogated from his authority,nor from the sovereignty of Turkey.Order thus established from rebellion,the Mixed Courts could continue their work knowing that sound government was present in the country,so that both the executive and judicial powers of the state were more or less in tune.British advisers were appointed,and police forces set up in Cairo and Alexandria.Lord Granville circulated the Capitulatory Powers with a message:'(Britain had)a duty of giving advice with the object of securing that the order of things to be established shall be of satisfactory character and possess elements of stability and progress'.This led to the second initial effect on the Mixed Courts and their influence-the establishment of a copy for Native jurisdiction.

At the same time as establishing executive control in Egypt(the so-called veiled protectorate)Britain saw the definite need for further judicial reform,following her support for the Mixed Courts.The next stage was to improve the quality of justice for all native disputes,and general criminal jurisdiction.The contrast between the Mixed Courts and the Native Courts was so marked that natives used all types of devices to get the Mixed Courts to hear their cases[14].The most usual was to assign a debt to a foreigner or otherwise involve him,so that the Mixed Courts would allow the case to proceed before them.Seeing the great

popularity of the Mixed Courts,and no doubt bearing in mind the original plans to extend this new system to all inhabitants of Egypt,Ismail had proposed in 1878 a vast extension of the Mixed Courts.The Mixed Court of Appeal was asked to outline suitable plans,and they proposed that all civil and commercial cases should come within the jurisdiction of the extended courts.Criminal jurisdiction was not to be included because of the risk of opposition to the reform as a whole.By suggesting to the Mixed Court of Appeal that it drew up plans Ismail had been clever in his approach,as the suggestions were at least taken seriously by the Capitulatory Powers,but in the end they were lost in the general confusion surrounding his deposition.It was left to Lord Dufferin in 1883 to reform the Native Courts as a means to better the judicial lot of the natives.He reported[15]'though perhaps the Native Courts were never more imbecile and corrupt than they are at present,the institution on the confines of the land of the International Tribunals(sic),and the administration within earshot of the people of what,with all its imperfections,is recognised as a justice which can neither be bought nor intimidated,has generated in the heart of the nation an unquenchable desire for righteous laws and a pure magistracy'.

In the circumstances it was quite logical for Tewfik and his British Adviser to turn to the Mixed Courts for a model of a system that could be quickly applied with the result of speedy and proper justice.Despite the initial reluctance of Britain to initiate a continental system for the Native Courts when they had,by virtue of the military occupation and executive advisers,a sufficiently strong presence in the country to impose an English or Anglo-Indian style court system,the model of the Mixed Courts was followed.It was popular with the Egyptians who had seen it in operation,it had a series of codes that could be simply adapted for native use,and using a continental system would ensure a reasonable supply of foreign judges to work alongside the Egyptian ones.Thus was set in motion a parallel system to the Mixed Courts.

Obviously and deliberately based on them,while making full use of Hussein Fakri's work in assessing the possibility of Sharia based codes,the Native Courts not only followed the laws and jurisprudence of the Mixed Courts,but also their example.The Mixed codes were translated into Arabic by Mohamed Abduh and Mohamed Kadri,and formed the basis of the Native codes with suitable amendments to allow for some changes in substance,but mostly to allow for differences in translation and expression.

It was to take many years before a sound native judiciary and Bar were established,but the structure was there,and provided the first impact of the Mixed Courts' principles on the Egyptian people as a whole,contrasted to those who had knowledge of them as plaintiff,defendant or interested party.Although many British advisers were later to call for a move to an Anglo-Indian scheme with codes based on English law,the court system soon settled down into divisions,and the British occupation,having hastened reform of the Native Courts,and established a copy of the Mixed Courts,had no other direct effect on the Mixed Courts or their influence at all.

In 1883 therefore the forum for a party depended on his national status,and there were four categories:
1)Egyptians.
2)Ottomans.
3)Foreigners of non-capitulatory countries.
4)Capitulatory foreigners.
Egyptians and Ottomans were treated as native subjects,and so categories 1) and 2)were the same.For most civil and commercial disputes categories 3) and 4) were in the Mixed Courts,but for crimes the foreign nationals of a non-capitulatory country were now clearly within the Native Courts. This was because the new Native Penal Code applied to everyone within the country who was not otherwise exempt[16], and for this reason the Native Penal Code was in immediate operation,and developed without the influence of any Mixed jurisprudence because the Mixed Penal Code was almost never used[17].In fact,the only penal procedures in general use in the Mixed Courts were those relating to

police offences,and this topic is examined in the next chapter.

It took some time for the Mixed Courts to get into their stride.By 1882 the average number of cases heard each year in all the District Courts was 5,000,and the Court of Appeal heard 300 a year.In the first year of operation the Court of Appeal dealt with 87 cases,in 1876-1877 the number had risen to 213,and in 1877-1878 321 cases were decided[18]. Most were straightforward applications of the codes to the matter in dispute.As such they gave everyone involved the chance to apply the new laws,and illustrated by example the working of the courts.If the clash between the Khedive's power and his courts is seen as a victory for an independent judiciary,a series of cases concerning the Caisse illustrated further that no authority,theoretical or actual,would deter the Mixed Courts from their decisions.

In February 1878 the Egyptian Minister of Finance was summonsed before the courts by the Commissioners of the Caisse,in order to account for the pledged state revenues. He challenged their right to summon him,not only because he denied their right to have an account,but also because he challenged the competence of the Mixed Courts to hear the case.The first point is very clear.In setting up the Caisse the Khedive had pledged certain state revenues for use in paying off the loans.These revenues had to be collected by the state as the Caisse was simply a control over repayment,and had no right to collect taxes,but was simply entitled to the due proportion of the revenue actually raised.Thus the agreement setting up the Caisse contained a right to pursue this money,and linked in with this right was the forum in which it could be exercised,and by whom:[19]

'Les commissaires de la Dette,representants legaux des porteurs de titres,auront qualité pour poursuivre devant les Tribunaux de la Reforme,contre l'administration financière...l'éxecution des dispositions concernant les affectations des rêvenues etc.'

On the 2nd.March 1878 the Mixed Courts gave judgement in favour of the Caisse against the Minister of Finance,

instructing him to comply with their requests.Once again the Government was seen as subject to the law,so far as the law provided.It was an important balance.The Government was neither free of,nor shackled to,the Mixed Courts.It was free within the law and restrained by it,and this fact again,as with the condemnation of the Khedive over his debts,was a most important aspect in establishing a rule of law in Egypt.

It might be thought that these decisions against the Khedive and Government,in favour of foreign creditors, were simply a means to ensure Egyptian money for foreign bondholders.Clearly though,the courts decided within the law,and were as strict with unjust claims against the Government as they were with the Government itself.Not all cases brought by foreigners succeeded,and each was treated on its merits.

The Mixed Courts were also not afraid of deciding against the advice of the British Consul-General,a person who had assumed an almost paramount political position since the 1882 Occupation.In 1884 the Egyptian Treasury was very short of funds.The Caisse on the other hand had a surplus over its requirements,and to remedy the Treasury shortfall so that the Egyptian Government could continue to be solvent Baring,the British Consul-General,advised the Treasury on the 18th.September 1884,to tell the mudirs to pay the balance of the allocated revenue to the Treasury and not to the Caisse[20].Although this action carried the approval of the British representative in Egypt,and even though it was a practical necessity in the circumstances, it was a breach of the law.The new Commissioners of the Caisse,with the exclusion of the Italian and English representatives,protested and issued a writ against the Prime Minister and Finance Minister of Egypt on Oct.4th. On Dec.18th the Egyptian Government was condemned in the District Court judgement and ordered to pay over the money at once to the Caisse.Once more a powerful authority had made a decision contraryto the law,and once more the Mixed Courts had upheld the law.Although an appeal was lodged against the decision,the Treaty of London of March

18th.1885 regulated future excesses of money,and provided more flexible working of the Caisse,and thus removed the necessity for hearing the appeal.In fact,because of this treaty the situation was favourably changed for Egypt,but the firm position of the Mixed Courts was not challenged. Consequently,changes in the law were made by the proper process,and till they had been made the Mixed Courts were clear in their interpretation of existing law.If an authority in Egypt did not like the law it had to change it first,and this bolstered the respect for law and judicial decisions.

At about this time Britain's overt protection was politely but firmly refused.The British consul had suggested that British troops should guard the Mixed Court buildings in case of further civil strife,but the judges decided against this in case it implied any legal or judicial acceptance of the British Occupation[21].In fact,this was the only gesture concerning the Occupation and the Mixed Courts were not called upon to decide for or against the fact. In any event,the British forces were there at the Khedive's invitation,and were not a threat to the smooth operation of the law.On the contrary,it was essential for there to be stability in fact as well as in law.

General Jurisprudence.

The cases involving the Egyptian Government,the Khedive and other authorities in Egypt,financial or political, were joined by many others establishing or clarifying principles.A great deal of the courts' time was spent in assessing its competence to decide and hear matters. Sometimes this competence was of lasting value,in so far as it set out guidelines for the review of administrative actions,public sovereignty,or the status and capacity of the sovereign or government departments.This must be contrasted with decisions as to competence which were of a more technical nature,though no less important at the time,such as the definition of foreigner within the codes. Although the need to define a foreigner now appears more historical than anything else,it is also of lasting importance for two reasons.First,the question prompted learned and reasoned opinions from the Bar and Bench,and contributed to the start of a continuing analytical and scholarly approach to problems of law.Although the facts were confused,and decisions made quite quickly,the path to these decisions was clear,concise,and well-researched.This approach was to be mirrored in all cases of interpretation in the Mixed Courts,and enabled a proper jurisprudence to build up.Naturally,the fact of a decision alone was of little use unless the reasons and approach were examined and subjected to analysis.This is precisely what occurred in the approach to a definition of foreigner.The second reason for a lasting importance is that the wider a definition of foreigner that was taken,the more cases came before the Mixed Courts,and thus the greater their influence.

The first decade of the courts saw several cases defining 'foreigner'.It will be remembered that competence had been granted over 'mixed' cases,that is those between foreigners and natives,or between foreigners of a different nationality.In addition there was jurisdiction over foreigners of the same nationality where real property actions were involved[22].So far as the latter were concerned,the codes referred to 'les actions réelles immobilières'.There was

thus no distinction over what types of law suits were within this definition-it was not only cases of buying or selling immoveable property,but all cases involving or concerning real property in any way.

The definition of foreigner caused more difficulty.Was a Turk a foreigner?Was the subject of another Ottoman dominion a native?Or were non-capitulatory foreigners within the definition for the Mixed Courts?

First of all it seemed clear that Turks were not foreigners.As Egypt was legally a part of the Ottoman Empire Turks could not be foreigners within a country that was technically theirs.The same reasoning applied to other Ottoman countries,so far as these were seen as other parts of the whole Ottoman dominions,and thus their natives were in fact simply treated as natives of Egypt,and not as foreigners.So far as non-capitulatory foreigners were concerned,the codes made no division between one or other type of foreigner,and therefore all foreigners were treated alike before the Mixed Courts.

Brazil,for example,was not a Capitulatory Power.It could not therefore renounce the Capitulations,nor be forced to renounce them before Brazilians were entitled to be heard in the Mixed Courts.The simple fact that Brazilians were foreigners and not natives was enough[23].In this way it was made clear by the courts that they were not simply a realignment of consular jurisdiction but a proper judicial reform affecting all foreigners,as had plainly been intended.

Other countries' relations with Egypt,and thus the status of their nationals,was sometimes determined by treaty.The Persians were recognised as foreign by a treaty of the 20th.December 1875 between the Ottoman Empire and Persia, which also accorded them most favoured nation status.The Mixed Courts consequently followed the provisions of this treaty and accepted Persians before the courts as foreign[24]. The same occurred to Roumanians,who were treated as foreign within the Ottoman Empire by the Treaty of Berlin in 1878 that established,inter alia,the position of Roumania after

its independence from Turkey.

What happened however to natives of countries that had been subject to Ottoman sovereignty and had not had their status clarified by treaty?Early decisions assessed the status of the nation. Was the country fully independent from Turkish control,both de jure and de facto?Was it recognised as independent by other independent states?Did it occupy a clear and unambiguous territorial position?Considering these factors the courts held Moroccans to be foreigners[25] followed later by a similar decision for the Algerians[26].

One problem of the Near and Middle East at the time was the ease with which nationalities could be given up or changed.The Mixed Courts solved this potential problem by stating clearly that once they were competent to judge a case because of mixed nationality,any change of nationality that would otherwise have affected the original mixed status of the case was to be ignored.In short,once within the Mixed Courts the case stayed there[27].On the other hand if a person in a case before some other court established that he or she was a foreigner,or of a different nationality from the other party,so as to give competence to the Mixed Courts,this change or proof meant that the case had to go to the Mixed Courts.In this way they jealously guarded their rights-they were prepared to take over cases but not to lose them.There was the tacit acquiescence of the parties and the Egyptian Government for this view till the Native Courts were sufficiently good for there to be an equal chance of justice there.

A party proved nationality,if that were necessary,by providing a certificate from his consul,if a foreigner,or from his local authority if a native[28].The courts did not look behind the certificates when individuals presented them,and took them on their face value.The same was not true of the apparent nationality of companies and administrations.The theory soon developed of seeking a mixed interest,regardless of any certificate of incorporation, whereby the Mixed Courts then declared themselves

competent to decide all cases where there was a foreign interest.Indeed,this was perhaps not so much a departure from the true words of the codes as might appear.The provisions[29] stated that all disputes between natives and foreigners,or foreigners of different nationalities,would be heard by the Mixed Courts.On a strict interpretation this meant that the nationality of the parties,whether individuals or juristic persons,would decide the matter. The judges however interpreted the provisions as allowing them to decide whenever a mixed interest appeared,and thus took a wide interpretative stance.It was a short step to declaring that companies with foreign shareholders were a mixed interest,and justiciable before the Mixed Courts only.

The first case of importance on this point concerned the Suez Canal Company.By the 1866 Convention between Egypt and the Company,the latter was declared Egyptian[30],to be regulated by the laws of Egypt.Its internal administration was to be governed by French law,decided by arbitrators with an appeal to the French Imperial Court on these internal matters.Differences in Egypt between the company and others 'seront jugés par les tribunaux locaux suivant les formes consacrées par les lois et usages du pays et les traités'[31].There were of course no Mixed Courts in 1866,but the clause is clear-Egyptian courts would decide disputes in Egypt subject to treaty,custom and usage. In 1880,when this case was decided,there were two possibilities,either the Native or the Mixed Courts.Both could be classified as local,but only the Mixed Courts showed any organised system of law and codes.The practical answer was to have this immensely powerful company judged in courts that had already shown that favour and power carried little weight.The legal answer was therefore to declare competence on the grounds that foreigners owned shares in the Suez Canal Company,and thus there was a mixed interest,regardless of the fact that the company was Egyptian[32].

This theory was repeated in all similar cases.In 1881,the Administration of the Domains(some of the Khedive's private land holdings)who acted on behalf of foreign creditors, was declared justiciable before the Mixed Courts on the

basis that the beneficiaries of its work were mostly foreign,and therefore gave rise to a mixed interest.The court held that the interested creditors were the people to be regarded,not the nationality of the Commissioners of Administration,nor whether they were officially Egyptian state employees or not[33].A little later it was decided that the foreign interest need not be named or figure personally in the action.It was enough that the court, looking at all the facts,could visualise that there might be a foreign interest and therefore a mixed case[34].This was the start of a long attitude towards regarding the substance of a matter and not just the form.For example,the courts 'pierced the veil',and looked behind the incorporation of companies to see whether shares were held by foreigners,or even whether they might be.This was in isolation from any issue as to limited liability or juristic personality,and was solely to judge the preliminary issue of competence.In going behind the incorporation the courts did not destroy that concept at all,but lifted the cloak of incorporation temporarily.

In 1883 it was held that 'changement des actionnaires dans un pays qui voit constamment les affaires se contracter entre personnes de nationalité differentes' was so common as to raise a presumption of a mixed interest where any company with shareholders was concerned[35].

What was the effect of this theory?With its constant use, the Mixed Courts gathered to themselves all civil and commercial litigation of any importance at all.They were the only relevant courts so far as commerce was concerned, and this meant that their decisions and attitudes determined the course of all commercial and financial ventures in Egypt.

The mixed interest theory also meant that almost all bankruptcies were carried out through the Mixed Courts. They decided that it was a case of mixed interest if any of the creditors,for however small or doubtful a claim, were foreigners[36],and thus came to control all of Egypt's bankruptcies [37].

One point needs to be considered in relation to the Mixed Courts' competence over land,mentioned above.The codes covered disputes over real property between parties of the same nationality.Constructing the phrase in context leads to the conclusion that this must mean parties of the same foreign nationality,and thus not including two natives who have a dispute over land.Within weeks of the courts opening this issue had to be resolved,and it was held that if the parties were native then the Native Courts only had jurisdiction,despite the apparent meaning of the particular phrase 'appartenant à la même nationalité'[38].

Most of the early cases were by way of the courts finding their position and defining their own competence,and this led to a wealth of jurisprudence on the subject.There were also more basic points to be decided,and in one area in which there was no codified law,that of literary and artistic property,the Mixed Courts used their right to decide on the basis of natural law and equity[39].The absence of any codes on this topic could have left open the opportunity to steal ideas and designs,and generally take advantage of writings,inventions and all other intellectual property.The courts therefore decided that they were entitled to hold that damages must be paid to anyone harmed by the wrongful use of intellectual property and with this one decision[40]closed the gap the law had left and began to develop a sound copyright jurisprudence.They were aided in this by their liberal interpretation of 'property' in the codes,whereby property was stated to be the right to dispose of and enjoy things as one liked[41]. By developing these principles the judges were able to maintain a constant flow of protection,and to continue safeguarding all such property without any need to have specific legislation promulgated.

Finally,a further selection of cases show other topics that gave rise to declarations of principle.As a matter of enforcement of the courts' wishes,judges fixed a variable penalty for each day an order of the court was not complied with[42].This was of great importance in persuading

reluctant parties to obey the court,as well as making the enforcement of judgement debts easier.

In another case it was held that damages resulting from a crime where different nationalities were involved could be decided by the Mixed Courts even though the crime itself was outside their jurisdiction[43].Thus unable to penalise the criminal by way of imprisonment,the Mixed Courts could nevertheless order damages to be paid to the victims.

An interesting contrast to French law is provided by a case where it was held that a landlord had to prove that it was the lessee's fault if a house burnt down,whereas the opposite was true in French law[44].This is useful not only for the actual result of the case,but also for the fact that the judges felt no reason to follow the French law in this matter when there was no specific provision in the Egyptian codes.

Lastly,a case that involved a matter of public policy was decided on the grounds of a simple contract.The victim of a crime promised that he would not prosecute the matter if he was paid 35,000 PT by the criminal.In an action to recover this money the court considered the loss,assessed it at 12,000 PT,and so reduced the claim by the victim to 12,000 PT [45].Despite the fact that initiating the prosecution of a crime is a matter of public policy and public order,the court contented itself with looking at the matter as an issue of contract.This can perhaps be best seen as the Mixed Courts' desire to compensate the victim,rather than any principle denying the relevant authorities the right to prosecute.

The Mixed Court as a court of claims.

The settlement of claims by diplomacy was one of the features of Egypt pre-1875.To settle outstanding claims after 1875 two systems were introduced to take away from the diplomatic field disputes which properly belonged in a court of law.In the first,three agreed Court of Appeal judges decided the matter as a board of inquiry,or as arbitrators,and the decision was final.In the second,the claim was referred to a special chamber of the District Court,and its decision could be appealed to the Mixed Court of Appeal.

Both systems used those laws that had been in force at the time of the original claim,so far as was possible in the changed circumstances.If there was more than one nationality involved it was for the consuls to agree on a choice of system,but otherwise the claimant was free to make his own choice.

The first system heard 109 claims in its first year,and the second dealt with 208.Most of the claims were French, followed by the Greeks,Italians,Austrians,English,and a few from other Capitulatory Powers.The effect of these courts of claims was to clear away all outstanding disputes and especially to reduce the grossly exorbitant ones.All cases were decided by proper judges,albeit using old law, and substantial reductions were made in most cases[46]. Claims arising after 1875 were of course nothing to do with this transitory system,but progressed through the courts in the usual way.It was another example of an obvious way of settling disputes fairly and quickly,and showed a further desirable consequence of the Judicial Reform.

Administrative Influence.

As part of their overall judicial task the Mixed Courts administered their own registries to keep records of all land transactions.The fees received for this service by the depositors of title documents amounted to 4/5ths of the courts' total revenue in the beginning years,and provided a stable source of income as well as defining title and ownership.This system was so successful that native subjects tried to register their land at the Mixed Court registries, only to be refused at first.The alternative was to register at the Sharia courts,and this was cumbersome and inefficient. There was no reason in law why the Mixed Court registries should not have been open to all,and so in 1877 a circular of the 6th.August was sent round to the greffiers in charge of deeds,informing them that they were to open their facilities to all applicants[47].

The registration of land went a great deal of the way to consolidate the titles of urban and agricultural land,and put the constant furnishing of proof on a more scientific basis.In so doing it reformed a situation that had previously been so bad that no clear idea of title was held by the majority of landowners or occupiers.The new system allowed freer and more secure negotiations for sale, purchase and mortgage,and helped to eliminate considerably the incidence of fraud.In future years this juridiction gracieuse of the Mixed Courts grew to cover all manner of deeds and notarial acts,and to provide one of the most important executive factors of commercial stability in Egypt.In addition,the development of this administrative side went hand in hand with judicial development,and provided the efficient support for all the truly judicial tasks of the courts.The system gave security to the people of the country in a way never experienced before.If a deed was properly registered,it was as conclusive as possible of the facts recorded on its face,and allowed a reliance on documents that helped the speed and efficiency of the judges.

Conclusion.

The first ten years of the Mixed Courts saw a wide variety of actions.Those involving the Khedive,the Government,and the Caisse de la Dette Publique,could all have been the end of the courts,and it is a tribute to their standing and usefulness that they survived.These early examples of steadfastness helped to create an atmosphere of legal confidence,and ensured that the Mixed Courts' judges were always busy with more and more cases.Egypt's prosperity increased also,due very much to the new financial and legal stability[48],and the years from 1886 to 1895,dealt with in the next chapter,saw an enormous expansion in trade,and a realignment of the penal jurisdiction of the Mixed Courts,together with amendments to their ability to decide new laws.

The final proof of the satisfactory nature of the Reform in the years 1875 to 1885 must be that none of the countries involved allowed the courts to fade away.It was agreed in 1875 that a review would take place five years later,and the approval for renewal of the courts was unanimous.Indeed,renewal took place regularly,sometimes for five years,and occasionally for shorter periods,till 1921 when the Mixed Courts were prolonged indefinetely.

Notes to Chapter 3.

1.See Sanhouri,Legislating contrary to the Constitution and Developments in application of Legislative Power(Arabic),1952, Cairo.

1A.Art.6 MCC;Art.10 ROJ.

2.Art.7 MCC;Art.11 ROJ.

3.There were reputedly hundreds of cases pending in 1877- see extract from the Daily News of February 19th.1877 in Brinton,op.cit. p.28;the Mixed Court of Appeal realised that care was necessary when dealing with the ruler of Egypt: 'Chaque Etat indépendant,qu'il s'agisse de pays de chrétienté ou de pays hors de chrétienté,est nécessairement le siège d'une souveraineté propre dont l'essence est d'être territoriale,c'est-à-dire d'étendre son empire à toutes les personnes qui habitent le territoire,sans distinction entre les nationaux et les étrangers,sauf les immunités reconnues à ces derniers par les actes diplomatiques ou bien consacrées par un usage...il est donc impossible de ne point reconnaître au Gouvernement égyptien dans les limites de la constitution propre du pays et des pouvoirs délégués par le Sultan,le droit d'édicter toutes lois d'administration intérieure, obligatoires en principe tant pour les étrangers que pour les indigènes,sauf le respect absolu des droits et immunités reconnus par les anciennes Capitulations et les conventions..' MCA 16.3.1880.This view did not prevent a strong line being taken against Ismail's behaviour regarding his debts.

4.Art.18 ROJ:L'exécution des jugements aura lieu en dehors de toute action administrative,consulaire ou autre,et sur l'ordre du tribunal.Elle sera effectuée par les huissiers du tribunal avec l'assistance des autorités locales si cette assistance devient nécessaire,mais toujours en dehors de toute ingérence administrative.

5.Claim to Horatio Lloyd in 1876 regarding the Alexandria Breakwater Constructors' case,see Dicey op.cit. p.164.

6.As per Art.18 ROJ,see note 4 above.

7.Livre D'Or,p.163a.

8.Livre D'Or,p.435.

9.On 13.11.1876 under the powers of discipline in Art.24 ROJ.This matter was discussed in the House of Commons on 21.7.1876,see Hansard of that date,s.1698.

10.La Reforme,28.1.1878.
11.The telegram addressed to Ismail 'ex-Khedive of Egypt', read:'It has been proved that your maintenance at your post can result only in multiplying and aggravating present difficulties.His Imperial Majesty the Sultan has therefore decided...to appoint Mohamed Tewfik Pasha Khedive of Egypt..'
12.On 7.5.1876 Egypt's debt had been consolidated at £91M-Cromer,op.cit. Vol.I,p.12;in his desperate attempt to raise cash Ismail had sold his Suez Canal shares for £3,976,582. Debt repayments equalled 16,565,000 LE per annum,or 2/3 rds. of Egypt's total revenue-Mansfield,The British in Egypt,1979, London,Wiedenfeld & Nicholson,p.9.
13.Cromer,op.cit. p.33.
14.Scott,op.cit. p.236.
15.Report from Egypt no.6,1883(Public Record Office).
16.Art.1 NPC:Le présent Code est applicable à tous ceux qui, en Egypte,commettent les infractions prévues par ses dispositions,à moins qu'ils ne soient,en vertu des lois,des traités ou des usages,affranchis de la juridiction des tribunaux indigènes.
17.When the Mixed Courts gained practical criminal jurisdiction in 1937 they looked to the then Native Penal Code for a model on which to base the Mixed Penal Code,see Chapter 8.
18.Hansard,March 13th.1882,s.777.There were 388 MCA cases in 1878-9,and 405 in 1879-80.
19.Art.38,Law of Liquidation 1880.
20.Lord Cromer,as Baring became,himself said that this was with the authority of Lord Northwood-Cromer,op.cit. p.116.
21.Berque,Egypt,Imperialism and Revolution,1972,London, Faber & Faber,p.151.
22.Art.5 MCC;Art.9 ROJ.
23.MCA 16.2.1882 RO VII p.93.
24.MCA 1.3.1877 RO II p.157;21.2.1878 RO III p.123.
25.MCA 5.6.1879 RO IV p.390;see note 16 Chapter 4.
26.MCA 16.2.1882 RO VII p.93.
27.21.3.1881 RO VI p.154;1.6.1881 RO VI p.184.
28.MCA 7.12.1876 RO II p.38.
29.Art.5 MCC;Art.9 ROJ.
30.Art.16,1866 Convention.

31.Journal of the Egyptian Society of International Law(ESIL), 1956(II),Vol.2,p.66.
32.Stavri Magripili v Suez Canal Company,MCA 26.5.1880 RO V p.263;in disputes between the Canal Company and foreigners the Mixed Courts also had jurisdiction.
33.12.5.1881 RO VI p.171.
34.MCA 4.5.1882.
35.Credit Foncier Egyptien v Daoud Pacha Yakan MCA 31.1.1883.
36.El Chamaki v Faillite Omar Zasuari,Alex.District Court 31.3.1881.
37.This only covered commercial people because none of the Codes provided for the bankruptcy of non-traders.
38.MCA 17.5.1876 RO I p.67;6.2.1879 RO II p.119.
39.Art.11 MCC;Art.34 ROJ.
40.MCA 18.7.1876 RO II p.159.
41.Art.27 & 28 MCC.
42.Known as astreinte,MCA 16.1.1879 RO IV p.97;there was no specific provision in the Codes and thus it was a judge-made enforcement measure.
43.MCA 13.3.1879 RO IV p.191.
44.29.1.1880 RO V p.125;see Scott,op.cit. p.271.
45.MCA 2.12.1885 RO XI p.12.
46.Cromer,op.cit. pp.54/55,estimated that there were almost £40M worth of claims against the Egyptian Government in 1875. In one case a claim of 30M francs was reduced to £1,000 by the court;see note 24 Chapter 1.
47.Court of Appeal no.684/1877.Receipts from registrations were 30,400 LE in 1876,92,000 LE in 1878,and 160,000 LE in 1883.Registration did not involve any proof or allegation of a mixed interest.
48.In 1879 Egypt's exports were 13,810,000 LE,and imports were 5,410,000 LE.Contrast with exports of 4,454,000 LE in 1862,and imports of 1,991,000 LE in the same year-Mansfield, op.cit. p.7.

CHAPTER FOUR

1886 TO 1895.

Introduction.

This chapter starts with The Development of a Theory of a Mixed Interest,covering the Daira Sanieh,the Ottoman Bank,the Suez Canal Company and others,leading to a section on Competence of the Mixed Courts by virtue of Nationality,and the Approach to Consular Immunity.This is followed by a section on Public Administration and Government Immunity,which considers the loss of Sudan,the Alexandria Municipality,and Government concessions. The chapter continues with The Legislative Capacity of the Mixed Courts and the effect on Police Offences(that is trials of contraventions),The Mixed Courts and taxation of foreigners,and a view of General Jurisprudence.The Effect of the Enforcement of Mortgages on landowners in Egypt concludes the text.

After ten years of feeling their way the Mixed Courts entered the second decade with more confidence,and with sufficient experience to tackle the further problems that arose.The Reform was by no means assured,and the success or failure of the Mixed Courts rested on their ability to maintain the good work which they had started.

The Development of a Theory of a Mixed Interest.

The years 1886 to 1895 saw many more cases concerning the search for a mixed interest in disputes.As in the first ten years of the Mixed Courts these further cases involved huge commercial enterprises and provided the Mixed Courts with cases involving millions of pounds worth of property.To develop their jurisprudence the judges continued to analyse closely the subject matter in issue,and relied on their own previous decisions.The momentum of judicial analysis was thus maintained,and the principle of persuasive precedent established.There was no rule that precedent bound a court,inferior or equal,but it became generally accepted that previous decisions carried great weight and were usually followed, although they were open to critical analysis and adaptation to changed circumstances.It is worth noting at this stage that in the period 1886 to 1895 this system of persuasive,almost binding,precedent caused no difficulty but with the later expansion of the courts,and the consequent increase in judgements rendered,the scope for a conflict of decision(and so authority)between different chambers of the same court became much greater,and gave rise to anxiety amongst the judges.

The first case of importance on mixed interest was one concerning the Daira Sanieh .The Mixed Court made it clear that its competence was determined according to the character of the interests in cause,and not according to the nationality of those who looked after the interest [1]. This followed exactly a previous decision on the Domains Administration[2],and was entirely consistent with the principle that all foreign interests were to be decided before the Mixed Courts.The judgement was carefully worded and argued,and the most important feature is the reference to previous decisions.Having analysed and set out the facts in issue and the law relied upon,the court added,by way of further confirmation of the viewpoint already adopted,that there was a continuous jurisprudence on the point of mixed interest in such cases,and that

each time a similar question was presented to the courts they arrived at the conclusion that the Mixed Courts were the only tribunals with jurisdiction.Following this line of authority,the court decided,in conjunction with its own analysis,that the Daira Sanieh was within its jurisdiction.Precedent thus began to play an overt part in the decision making process.

The real test of whether the Mixed Court judges were correct was soon in progress when the Native Courts themselves claimed jurisdiction over the Daira Sanieh. This conflict of interests was all the more serious because the Native Courts had already given final judgement in the case,and had ordered the attachment of property in the action.The Mixed Court of Appeal critically studied the case,and gave judgement against the Native Courts,declaring that they lacked competence to hear this or any other case concerning the Daira Sanieh,that as a result the Native Court's judgement and order of attachment was void and of no effect,and that the parties were to be returned to the position they were in before the Native Court's action.This attitude was later followed[3],and the overriding right of the Mixed Courts to declare their competence as against another Egyptian court was established.

It was perhaps a defect of the codes that no procedure existed for settling internal conflicts of jurisdiction between the Native and Mixed Courts.However,the greater judicial authority of the latter,together with the continuing reluctance to place too great a reliance on the former,meant that for practical purposes the Mixed Courts were masters of their own jurisdiction, within the terms and interpretation of the codes.

The next case concerned an even greater organisation than the Daira Sanieh,and one with overseas and governmental interests.The Ottoman Bank case[4]concerned a bank controlled by a council of administration,whose members lived in various parts of Europe(mainly London and Paris)and in Turkey.It was regulated by Concessions

from the Sublime Porte of the 18th.September 1878 and the 5th.April 1879,and the Egyptian Government claimed that by these concessions the bank was not subject to the local courts.This the court dismissed at once, stating that the argument that a private agreement regulating the establishment of a bank could oust the jurisdiction of the courts,when that jurisdiction was established by law,was so weak as not to merit consideration by the court.

The next point was more difficult.The argument was put forward that the headquarters of the bank was in Constantinople,and therefore all cases ought to be tried there,or that alternatively it meant the bank was a truly Ottoman creation with only an Ottoman personality. Added to this was the fact that the Ottoman government had guaranteed to protect and supervise the bank which, it was submitted,gave the whole organisation a distinctly Ottoman character.The court did not agree.It was accepted that the bank was an Ottoman creation,but the fact of a headquarters in Constantinople was not accepted because of the residence and habitual business place of the council members,and even if it had been it was declared of no conclusive weight.

The Ottoman character of the bank was also dismissed. It had a superficial Ottoman personality,but this was nothing compared to its wide sphere of operation,its vast spectrum of activity,and the overriding fact that it was controlled by people of different nationalities on behalf of capital subscribers of different countries.

A final point was submitted concerning the Ottoman Bank's role as treasurer,paymaster,and financial agent of the Ottoman Empire,an allegedly state and sovereign function. This argument was rejected on the grounds that its function was to act as banker to many people,and the inclusion amongst its customers of the Ottoman Empire itself was not a factor to upset the jurisdiction of the Mixed Courts.Thus the courts succeeded again in keeping control,judicially,over a large and ubiquitous

organisation.The case showed a further development in the distinction between public and private government acts,and also a reluctance to accept apparent form as conclusive.It attached to the Mixed Courts yet more litigation and therefore increased their influence even further by supervising the activities of this vast enterprise.

Shortly after this case another dispute concerning the Suez Canal Company fell to be decided,this time before the French Consular Court[5].Bearing in mind the French involvement in the Suez Canal,and the Convention of 1866 which allowed French law to regulate the internal affairs of the company, it might have been thought that the French would seek to claim jurisdiction themselves,despite earlier Mixed Court judgements to the contrary[6].

In fact,the French Court of Appeal at Aix,on appeal from the French Consular Court in Egypt,decided to follow the Mixed Courts' jurisprudence and conceded that the Suez Canal Company was subject to Egyptian law,and therefore the case should be heard by the Mixed Courts as the relevant Egyptian tribunal.This recognition by the French court of Egyptian decisions,especially concerning a company as large and influential as the Canal Company,was a major step in the recognition overseas of the ability and jurisprudence of the Mixed Courts.It was especially welcome given initial French opposition to the whole concept of the Judicial Reform,and it bolstered the standing of the Mixed Courts in Europe[7].

A later decision reaffirmed the notion that a mixed interest did not have to be formally proven or even shown.It was held, in line with previous authority,that it did not matter how vague or distant a mixed interest was;so long as there was one it would form the basis of Mixed Court competence[8].This reasoning did not go unchallenged.Doubtless fearing a lack of work and experience for the Native Courts,and also bearing in mind the heavy burden on the Mixed Courts,a movement began amongst government lawyers and legal observers to restrict somehow the application of the mixed interest theory.The main obstacle to this restriction was that the

theory was in fact consistent with the codes;the Mixed Courts had been given competence in disputes concerning foreigners and natives[9] and they simply endeavoured to find a foreign element so as to claim jurisdiction for themselves.

There were nonetheless limits beyond which the Mixed Courts would not go.In 1889 they declared themselves not competent to decide in disputes between natives and the Customs Administration,because the Customs Administration was a native Department of the Government and so any such dispute was between two natives.The fact that excise duty had been allocated to the Caisse de la Dette to repay foreign loans was seen as far too tenuous to be supported as a serious interest.The court declared that a mixed interest must be one capable of being the base of some eventual legal intervention[10] and thus set limits on how far a mixed interest theory could be pursued.

The court's declaration was useful for another more practical reason.Self-imposed limits reduced the impetus for reform of the relevant provision in the codes,and ensured that what reforms were discussed were on a specific rather than a general basis.It was in fact to take many more years before even these specific reforms were considered by the Capitulatory Powers.

The final important case of this period to concern a mixed interest was one that involved the Cairo Waterworks Company[11]. A native sued the Waterworks,which was an Egyptian company, in the Mixed Courts.The company at once denied that the court had jurisdiction,claiming that as both parties were Egyptian the appropriate forum was the Native Courts.The Mixed Court of Appeal held that what was vital was the character of interests in a case,and not just the personality of the parties.Declaring itself bound by the codes to safeguard all mixed interests the court decided that it was competent to hear the case.In itself the decision was quite expected, and in conformity with the viewpoint adopted for previous cases,including those dealt with previously such as the Daira

Sanieh case,and the Domains Administration(see above), and also the Credit Foncier Egyptien[12].What was of greater interest as an illustration of the judges method in legal interpretation was that,apart from the closely argued analysis and recitation of law and fact, the court expressly stated that one of the grounds for decision was that in a conference held in Cairo in 1884[13] all the parties present,that is Egypt and the Capitulatory Powers,agreed that any company,Egyptian or foreign,with shareholders of different nationalities was within the jurisdiction of the Mixed Courts.In taking the activities of a legal conference between the parties to the Judicial Reform as a means to interpret the law the Mixed Courts began to look further than a view of the codes,and this wide approach considerably strengthened the opinion that they formed a developing jurisprudence,prepared to look outside the codes or behind the letter of the law to seek an answer;they did so with skill and success,due in a large degree to the high standard of the judges,and that they did so at all reflected the discretion they were given to find solutions to the problems presented to them.

Competence of the Mixed Courts by virtue of Nationality;the Approach to Consular Immunity.

Competence by virtue of a mixed interest has been discussed above.This section considers competence as a result of individual nationality[14],and the immunity or otherwise of consular officials.

Amongst Government agreements to treat certain nationalities as foreign the Mixed Courts accepted[15] the Agreement of the 7th.April 1887,between the Khedive and the French Agent and Consul General,to regard Tunisians in Egypt as French administrées.This followed the realignment of Tunis away from the Ottomans and towards France,resulting in the Treaty of Bardo in 1881 whereby Tunisia became a French Protectorate. The recognition of these former Ottomans as foreigners thus extended the jurisdiction of the Mixed Courts over another group of people who had originally been subject to the Native Courts,and brought the influence of the former to all North African Arabs-Algerians and Moroccans already having been accepted as foreigners in Egypt[16].

In 1892 it was held that the provisions relating to mixed suits in the Règlement d'Organisation Judiciaire(the Judicial Rules)and thus the Judicial Rules themselves,had the character of an international treaty by the adhesion of the Capitulatory Powers[17].This was not a new idea and had been considered as the correct interpretation of the founding of the Mixed Courts since 1875.What is important though is that it shows that the courts were still aware of the basis of their jurisdiction,and recognised that it was founded on mututal agreements with the Khedive.It thus had a clear and unambiguous authority.It did not mean that the courts viewed themselves as international,or in any other way as not Egyptian.It is the case however that the courts periodically felt it necessary to reiterate their foundation to refute or illustrate various points.

Somewhat surprisingly the question of competence as to real property actions was once again raised.It had already been decided many times[18] that the obligation to proceed before the Mixed Courts where real property disputes existed between persons belonging to the same,or the same alleged,

nationality meant foreign parties belonging to the same foreign nationality.This was so clear and consistent with authority that it is odd that the point should have been subjected to further litigation.However,the Cairo District Court had to decide this matter again[19],and gave a firm judgement against the right of two natives to bring their land action before the Mixed Courts.The action was all the more strange because it concerned land in a village in Upper Egypt,a considerable distance for all parties to travel to Cairo where the court was situated.

The judgement first of all established the fact that there was no mixed interest.It then went on to discuss the means of interpreting the phrase 'ils(the Mixed Courts)connaitront aussi de toutes les actions réelles immobilières entre toutes personnes,même appartenant a la même nationalité' [20].There were several ways,the court held,of looking at the phrase.First,at the time the Article was drafted the common use of the word nationalité meant a foreign nationality,and thus no reason could be sought for a contrary intention on the grounds of common usage.Secondly,it was better to regard words as mere expressions of thought and consequently, what was the legislator attempting to do?Clearly,the court thought the idea was to prevent land disputes being heard by consuls and thus,despite the same nationality,the Mixed Courts would have jurisdiction.As a reminder,in actions over moveable property between foreigners of the same nationality,their consul had jurisdiction.Thirdly,the court preferred to look at the spirit rather than the letter of the law.Applying these theories the Mixed Court declared itself incompetent to hear the case.

Apart from confirming what was already quite well established,the case is of note because it shows the generous view taken of interpretation.A literal or restrictive interpretation was rejected in favour of one

that reflected the broader view of the legislator,and this was of significance in encouraging a more relaxed approach than might otherwise have been the case.After all,the generous interpretation of laws required a judge to think,research and justify,and this therefore led the judiciary to develop the law to fit their views of the cases,as well as providing ample material for lawyers to use in preparing briefs for one side or the other.

Finally,on the matter of consular immunity,the Mixed Courts kept to a restrictive interpretation.Reluctant to allow native subjects to escape jurisdiction altogether by means of alliance,sincere or opportune, with a consul,the courts required consular immunity to be formally recognised by the Egyptian Government. This was either by an agreement with the country concerned or some other administrative measure.Vice-consuls,honorary consuls,dragomen and consular agents had to prove their entitlement to consular immunity before the courts.The reason why they came before the Mixed Courts rather than the Native Courts is because they usually had diplomatic protection and were therefore treated as foreigners.The courts were very reluctant to go further than accepting them as foreign for judicial purposes,and did not generally allow immunity as well.In this respect the decisions helped to reduce one of the continuing abuses from pre-1875 days.[21]

Public Administration and Government Immunity.

One of the most fertile fields of jurisprudence was in the area of actions against the government or public administrations.It has been seen in previous discussions that the Mixed Courts were not slow to adjudicate in these disputes,but they did so on carefully considered arguments.They were not prepared to encroach on public sovereignty,not only because the codes gave them no authority but also because they had stated time and time again that it was not for the courts to challenge public sovereignty.An illustration of this attitude was the case of Zobeir Pasha[22].

Zobeir Pasha was a wealthy trader and landowner,who had extensive interests in Sudan.As a consequence of rebellion and the inability of the Egyptian Government or British forces to maintain order in Sudan against the Mahdi's forces,Zobeir sued the Egyptian Government for an indemnity to cover his losses in the Sudanese provinces.Through a technicality of an 1888 Decree[23],his action lay against the Caisse de la Dette Publique and not against the government because the former organisation was responsible for the settlement and payment of certain debts.Nonetheless,the action centred on whether a plaintiff could correctly sue the Egyptian Government for failing to keep Sudan,or maintain order there.The claim was straightforward.Zobeir had lost a huge sum of money in Sudan because it had been abandoned by the Egyptians,and he consequently demanded recompense.

After detailed arguments on both sides the Mixed Court of Appeal held that this was a question of public sovereignty,and as such could not be entertained. Whether a government succeeded in keeping a province controlled and in order or not was something that no court of law could review.In reply,Zobeir alleged that the Mixed Court's refusal to hear him left him without a remedy because it was established jurisprudence that the Native Courts could not judge the Caisse,due to the

mixed interest theory.To this the court countered that the matter was one of sovereignty,and it was not relevant to the decision that the application of this principle left the plaintiff without a remedy.

Zobeir then tried to argue on a strict interpretation of the 1888 Decree.The phrase that the Caisse 'constitue une personnalité etrangère et que pour toutes les contestations qui l'interèssent directement,elle ne peut être justiciable que des Tribunaux Mixtes' had been used more than once by judges,and Zobeir claimed that this meant that all actions concerning the Caisse,including his own,were triable by the Mixed Courts regardless of public sovereignty.This contention was rejected.The Mixed Courts refused to interpret the Decree so as to permit judicial review of sovereign acts,and Zobeir was unable to recover any damages.

The next public administration question was that of the Municipality of Alexandria.This was the local authority for the City of Alexandria,established by Decree on the 5th.January 1890,and administered by a council appointed on a mixed electoral basis.The question in this case was whether the employees of the Municipality were government employees or not.If they were,a Decree of the 25th.February 1890 prevented their salaries being attached for debts and related matters-if not,the salaries could be attached in the usual way.It was held[24] that the Municipality had a personality of its own,distinct from the Egyptian Government,and thus its workers were not Egyptian Government employees.This being established, it was a short step to find that there was a mixed interest in the Municipality,because of the mixed electoral basis,and so it was brought within the jurisdiction of the Mixed Courts.It may be remarked that this was so despite the quasi-governmental powers the Municipality exercised.The result of this case disturbed the Egyptian Government,who immediately set about agreeing a change in the law with the Capitulatory Powers,but it was an entirely correct result.The Alexandria

Municipality was a statutory body established by decree, in which was set out its rights and obligations.The courts were therefore entitled to examine this decree and the character of the Municipality itself to assess whether they were competent or not.As a result of the disquiet felt by the Egyptian Government,a new decree was agreed some years later,withdrawing cases between natives and the Municipality from the Mixed Courts[25], but of course disputes between foreigners and the Municipality remained.

The final case concerned government concessions.A certain Fell from England had gained a concession from the Egyptian Government to build tramways in Cairo.There were significant delays in starting work,and on the 20th. March 1890 Fell obtained the government's consent for a nine month delay.A year later work had still not started, and on the 27th.April 1891 the concession was cancelled. Fell sued the Egyptian Government in the Mixed Courts for his loss of profit,and the government contended that the courts had no jurisdiction because it was a case of public sovereignty.This allegation was rejected.It was held[26]that the granting of a commercial concession was not a matter of public sovereignty,and could therefore be tried in the courts.It was further held that Fell's reluctance to start work afforded the government an excellent reason for withdrawing the concession,and the claim for damages was dismissed.

Once again the difference between the government as a public authority and as a private contractor was shown,and although the government was not condemned to pay damages,the result did not entirely please it because of its reluctance to accept that even some of its actions were of a private,and therefore justiciable, nature.It should be noted that the concept of private and public acts of the government was entirely created and developed by the jurisprudence of the Mixed Courts.The codes themselves were silent on this matter, and the principle of government contractual relations

as a private person was to be one of the outstandingly original concepts developed and thought out by the jurists and judges of the Mixed Courts.

The Legislative Capacity of the Mixed Courts and the effect on Police Offences.

In some respects the Mixed Codes were a fixed set of laws. The judges were able to interpret them generously and fill gaps by using natural law and equity,but it remained the case that any new laws had to be agreed by Egypt with the Capitulatory Powers so far as they effected foreigners,just as the 1875 Judicial Reform had been agreed.

In general this was not inconvenient because a broad interpretation of the existing laws,or the use of natural law and equity,usually solved any problems.However,in the field of tax and penal laws some Capitulatory Powers objected to any application of such measures to their subjects.The first real difficulty arose in 1886 as a result of a penal case involving an Italian prostitute.

It was remarked earlier that the penal jurisdiction of the Mixed Courts was restricted to crimes involved in the administration of justice,and contraventions or police offences.The extension of any other penal jurisdiction to the Mixed Courts had been refused by the Capitulatory Powers ,and remained with the consular courts for their nationals.What sort of offence therefore was a contravention?

In the main the term covered offences such as bad lighting in hotels and inns,dropping litter on streets,unsafe roadworks,unsafe buildings,and other 'municipal' regulations. A second category covered dirty workshop chimneys,unlawful fireworks,firing guns within a village etc.,and a third category regulated registers of hotels,galloping in the street,refusing to accept legal tender,and selling poor quality fruit.There were many other categories of offences, and depending on the category a fine of from 5 to 100 PT could be levied,with imprisonment of up to seven days,and/or destruction,confiscation or closure of the subject matter concerned[27].These offences had been listed in the Mixed Penal Code of 1875 and were applied,as set out,before the Tribunal des Contraventions in each Court District.

The question in 1886 arose because the defendant,Rosina de Bello,had been summonsed to appear before the Tribunal for breach of special regulations governing the medical inspection of prostitutes[28].It was proved that she was guilty of the breach and a fine of 10 PT was imposed,with costs[29]. An appeal was soon lodged on the basis that the particular regulation de Bello was in breach of had not been approved by the Capitulatory Powers.To understand fully this allegation it is necessary to consider further the Mixed Civil Code.

The Code contained a clause for updating or adding new laws[30]. This allowed additions and modifications to be enacted on the advice of the entire judiciary and,if need be,on their initiative.It can be seen that this would have allowed the judges to change the Codes as needed,but in fact the procedure was never used.The explanation for this seems to rest on the reluctance of the judiciary rather than on the attitude of the Egyptian Government.On the 30th.November 1876 the latter suggested to the Mixed Court of Appeal that it should set in motion the enacting provision and approve new bankruptcy laws.The judges declined to do so.They claimed the procedure was not clear,and referred the suggestion to the consuls who promptly ensured that no further action was taken.In an attempt to clarify the situation the Khedive put this matter to the 1880 International Conference in Cairo,but no result was obtained.Two views did however emerge.

The first was as indicated above,that the updating Article was designed to allow progress and change,and should be used to put forward new laws without the cumbersome task of consultation with all the Capitulatory Powers.

The second view was that the Article simply referred to Art.37 of the Judicial Rules which required the Mixed Court of Appeal to draw up General Rules[31].It is clear though from the wording of the Codes that this second argument is not valid because Art.37 of the Judicial Rules stood clearly on its own,and required no aid from the Mixed Civil Code.It is also in keeping with the wide judicial powers granted in the

Codes that the entire judiciary should have been granted a measure of control over new legislation.

In any event, the appeal went ahead on the basis that no approval had been given under Art.12 of the Mixed Civil Code. The Government's case relied on two arguments. The first was that as the consular courts had lost all right to hear police offences, and these had been given to the Tribunal des Contraventions, all police offences could be validly heard by this latter court. Further, the sole restriction on the applicability of these offences lay in the penalty. No penalty of more than 1 LE or seven days imprisonment, apart from the condemnation or seizure of goods etc., could be levied, and thus the Government argued that the penalty determined the category of an offence and not its nature.

In support of this theme it was pointed out that Art.340 of the Mixed Penal Code provided that for Mixed Court purposes any penalties for police offences greater than the limits mentioned above should be reduced accordingly, so that the offences could be heard by the Tribunal without any plea that the penalties were too high.

The defendant's case was simple. She admitted that she had not complied with the medical regulations, but claimed that she did not have to do so because they had not been properly enacted. This was an argument which went much further than the case in question-if one offence had not been properly enacted then all police offences provided for since 1875 were invalid. The Mixed Court of Appeal held that this was indeed so. In a judgement given in Italian it was stated that Art.12 should have been complied with and was not, that none of the laws presented to the Capitulatory Powers had included the offence with which the defendant had been charged, and that no part of the Mixed Penal Code could be extended to allow new regulations. Consequently de Bello's appeal was allowed.

This case showed the inadequacy of arrangements for judging offences by foreigners. It was followed by a case in 1887 where the same reasoning was applied in even stronger terms. The court held that Art.12 was the only guarantee foreigners had against the caprice of the Government[32], a somewhat

gratuitous statement as no general complaint had been made about these very reasonable regulations,although they clearly annoyed those likely to be penalised by them.

The immediate result of these cases was a new Decree, agreed by the Capitulatory Powers,for police offences[33]. The decree was divided in two.The first part recited the police offences that had already been passed by the Egyptian Government,together with such additional ones as seemed prudent to add.Thus no future challenge could be made on the basis of non-conformity with the codes. The second part set out an amendment to Art.12,enabling the General Assembly of the Mixed Court of Appeal (contrasted with the previous grouping of the entire judiciary)to certify that any future police offences proposed by the Egyptian Government were both applicable to all the inhabitants of Egypt,and were not contrary to any treaties or conventions.It was also stated that no penalty above that already accepted for contraventions should be allowed.

This new measure did two things.First,the government was able to add police offences,though not other laws,by the approval of the General Assembly.Secondly,the General Assembly was entitled to reject these laws if they were to be unevenly applied,or if they derogated from accepted treaties.This new Mixed Court power was not legislative. The only power the General Assembly had was to sanction police offences proposed by the government.It had no right to legislate as such,but simply to verify proposed measures;nor could it initiate legislation,but only approve or disapprove.It was not therefore a transfer of functions from the executive to the judiciary,but only a convenient way to ensure new regulations required the approval of one set of judges,instead of being submitted to all the Capitulatory Powers individually.It gave Egypt partial legislative autonomy over foreigners,and allowed the experience and wisdom of the Mixed Court of Appeal to be used for slightly wider purposes than judges might normally expect.

The new system was a success.Regulations were submitted and enacted as required without difficulty,and the potential problems caused by the de Bello case were soon solved.

To end this discussion on police regulations it is clear from the records that the Municipality of Alexandria also made local bye-laws that were classed as police offences or contraventions.There is no record that any of these regulations were approved by the General Assembly of the Mixed Court of Appeal,nor that this lack of approval ever succeeded as a defence,if it was even put forward. The only possible answer is that the mixed elements of the Municipality were accepted as a sufficient guarantee that the bye-laws were correctly made,in that they were not against any treaty and applicable to all,regardless of nationality,and so no additional process of approval was required.

The Mixed Courts and taxation of foreigners.

The Capitulations had established the freedom of foreigners from arbitrary taxation.By custom and usage this had become extended in Egypt to virtual foreign exemption from tax.This was not warranted by the terms of the Capitulations[34],but in Egypt custom and usage had their own importance,and the practical situation was that few foreigners paid tax.No general agreement could be reached by the Capitulatory Powers on any actual tax laws,but in 1885 the British Government persuaded the other Capitulatory Powers to state[35] that in principle they accepted that their subjects in Egypt ought to pay the same taxes as Egyptians.

The main result of not being able to levy taxes on foreigners was that the greater part of the commercial life of Egypt went untaxed.Essential services used by foreigners,both for their individual use and for their commercial profit,were paid for by Egyptians whose standard of living and level of disposable income was very much lower.The lack of accepted authority to levy taxes also meant delays in setting up local municipalities because local taxes would not,on experience,be paid by most foreigners,although voluntary payment of some local taxes by non-Egyptians,mostly English residents,was common[36].

It was also unfortunate that certain countries held up tax reforms for long periods,using their agreement as a bartering point.Thus the Portuguese,who only had twelve householders in the whole of Cairo,held up agreement for a drainage tax in the capital for six months,till England agreed to certain Portuguese plans in Africa[37].

What was the Mixed Court's position in this?The courts took a reasonably consistent line in favour of foreign taxation,although this did vary.In 1889 indirect taxes were declared enforceable,but not direct ones[38].In 1890 it was held[39]that nationals of those countries that were

not Capitulatory Powers,but were within the jurisdiction of the Mixed Courts by agreement or treaty,such as the Moroccans,were subject to the same taxes as local subjects. Their Mixed Court status did not carry with it an exemption from tax.

In 1891[40]the court declared that all inhabitants of Egypt were subject to the fiscal laws,except as allowed by the sovereign.Given that the sovereign had agreed the Capitulations,it is difficult to see how this declaration could be interpreted either for or against foreign taxation,but later the same year it was held[41]that foreigners and natives were equal so far as taxes were concerned.Three months later it was decided that a Frenchman was not able to avoid paying a tithe on his date palms because there was no exemption available for such taxes[42].Finally,in 1894 the Mixed Court of Appeal again held that indirect taxes were permissible,but not direct ones[43],and the same day declared that the competence of the Mixed Courts to judge an Egyptian company by virtue of a mixed interest did not also allow the company to take on the quality of a foreigner for tax or other purposes[44].

The Mixed Courts were not in favour of complete freedom, but varied in their approach from an approval of some tax to an acceptance of all.Prompted by this jurisprudence, arrived at after searching study of the Capitulations and local conditions,Egypt and Britain sought and obtained greater scope for taxing foreigners in Egypt,and it can be said that the Mixed Courts,by discussing and setting out its views on tax,together with a concise statement of the authorities relied on,contributed to Egypt's gradual recovery of the right to tax all people within her boundary on an equal basis.

General Jurisprudence.

Several matters of general interest were decided in the period 1886 to 1895.First,the question as to the length of a 'year' was discussed.The codes used 'year' in many different contexts,but there was no definition of what type of year,Gregorian or Arab,was meant,although the Mixed Code of Criminal Investigation ,in Art.271,did mention an Arab year.In 1892[45],1893[46],and 1895[47],it was held that the Arab calendar was to be used.There were several reasons for this result.First,Egypt was an Arab country,and there was no indication that any other sort of calendar ought to be used.Secondly,the prescriptive periods in the codes were borrowed from the Sharia,and thus must have been based on an Arab calendar,and thirdly all periodic payments such as rent,fees,interest,or anything else payable monthly or yearly was to be paid according to the Arab calendar[48].Therefore by analogy the Arab calendar was applied in all cases where a calendar was required without a mention of what type.

Another case concerned payment to salvors when a vessel was saved.Surprisingly,no provision of the Mixed Maritime Code covered such payments,so the Mixed Court of Appeal held[49] that the salvor's remuneration was to be fixed by reference to Art.205 of the Mixed Civil Code,whereby someone who intentionally procures a benefit for another person is entitled to be repaid his costs and expenses up to the limit of the value of the subject-matter. Presumably this was meant to include a sum for profit.

Additional judgements were given on artistic property.In 1889 the Mixed Courts held that buying a music score did not thereby entitle the purchaser to stage a public performance for money[50].In the same year it was held that the unpermitted reproduction of writings gave rise to a claim for damages,and a declaration was made that authors' rights were property rights,to be held and enjoyed as other property rights[51].These and similar decisions represented a continuing process of protecting intellectual property,basically through an application of the rules of natural law and equity.This protection

was of benefit to everyone involved.It protected the owner of the artistic or literary property,or the owner of trademarks,and it also safeguarded the purchaser who might otherwise have been duped.Although the Mixed Courts could not generally use penal powers,their right to award damages,and to order the confiscation or destruction of the offending articles went most of the way to enforcing the principles developed.It is worth noting that enforcement was within the court's discretion,and it was up to the judges deciding the case to order the appropriate remedy.

Finally,it was held that the court itself was to decide the question of reciprocity for foreign judgements[52]. Art.468 of the Mixed Code of Procedure allowed foreign judgements to be enforced in Egypt by order of the President of the court,subject to reciprocity of procedure for Egyptian judgements in the country whose courts had given original judgement.Clearly,therefore, it was for the Egyptian court to determine whether reciprocal arrangements existed or not,and if they did to enforce the judgement as one of its own.

The Effect of the Enforcement of Mortgages by the Mixed Courts.

One criticism that began to be heard amongst domestic and foreign observers in the 1880s concerned the ease with which creditors were able to foreclose on land when loans were secured by mortgage.It has been estimated [53] that the registered debt of Egyptian farmers had risen to 7,230,000 LE by 1895[54],with 75% of this owed by 12,000 landowners with holdings of more than 50 feddans.The same writer considered that this was only half the actual debt,and concluded that the Mixed Courts,by their attitude to foreclosure and mortgage enforcement,had imposed this burden on the farmer.The same criticism had been expressed in the House of Commons[55] and other observers questioned the wisdom of allowing money lenders to gain control of Egyptian land by foreclosure.

On an objective assessment the allegations against the Mixed Courts can be refuted.The new Codes did allow foreclosure and the new land registries did make it easier to keep track of loans,mortgages and property,but the issues still had to be adjudicated in the courts,and the law was upheld fairly. Foreclosure was only allowed within the strict provisions applicable.In addition,the trade chattels of a debtor were exempted,and other terms were much easier than before,so that the new system may have been more public,efficient and obvious than the old,but it was nonetheless newly open to checks and regulation.

It is also worth considering that foreign capital flowed into Egypt as a result of the stability of the legal system and the greater security of loans meant a lower overall interest rate for all borrowers.The claims of creditors were viewed in the light of freedom of contract,combined with a fair approach to the annual percentage rate of interest.

In general therefore the Mixed Courts assisted debtors by fair and just regulation of their loans,and helped creditors by efficient registration of title and enforcement of judgements.The abuses that existed were mainly due to the type of lender who sought a quick profit,and who rarely kept within the law to get it.This latter category may have been able to use the system to advantage,but they received no active help from the Mixed Courts.

Notes to Chapter 4.

1.Abdallah Nasser v Daira Sanieh of the Khedive,MCA 14.3.1888 RO XIII p.112;'que la compétence se determine d'après le caractère des intérêts en cause et non d'après la personnalité de ceux qui les représentent...Attendu,au surplus,qu'il est d'une jurisprudence constante qu'alors même que le débat existerait entre deux indigènes,s'il vient à s'y manifester d'une manière certaine un intérêt mixte,même non intervenant ou appelé,les tribunaux de la Réforme ont seuls autorité pour y statuer'.
2.12.5.1881 RO VI p.171;see note 33 Chapter 3.
3.11.12.1890 BLJ III p.64.
4.11.2.1890 BLJ II p.255.
5.ve.Kintz c Compagnie du Canal de Suez,French Consular Court;see Lamba,De l'Evolution de la condition juridique des Européens en Egypte,1896,Paris,Lib.Univ.de Droit et de Jurisprudence,p.146.
6.MCA 26.5.1880 RO V p.263;see note 32 Chapter 3.
7.Aix Court of Appeal,4.3.1896,Lamba op.cit.,p.146.
8.23.11.1892 BLJ V p.22.
9.Art. 5 MCC;Art.9 ROJ.
10.22.5.1889 BLJ I p.142.
11.Youssef Kodja Zada v Cairo Waterworks Company,MCA 21.6. 1894 BLJ VI p.320.
12.Credit Foncier Egyptien v Daoud Pacha Yakan,MCA 31.1.1883; see also notes 2 & 6 above.
13.This conference was held to examine the role of the courts, suggest any reforms,and approve a continuation;'...les délégués des puissances et du gouvernement égyptien ont été unanimement d'avis que les contestations des sociétés anonymes,même égyptiennes,avec toute personne même indigène, relevaient des tribunaux mixtes,par cela seul que les sociétés,dont les actionnaires appartenaient ou pouvaient appartenir à des nationalités différentes,représentaient des intérêts mixtes dont la protection avait été confiée à ces tribunaux.Que si les décisions de cette conférence n'ont pas été,pour des motifs particuliers,sanctionnées par les puissances,elles n'en demeurent pas moins comme l'expression d'une interprétation officielle de l'art.9 du règlement

d'organisation judiciaire'.
14.The source for both mixed interest and nationality was of course the same,Art.5 MCC,but it is convenient to deal with each separately.The words competence and jurisdiction were in fact used interchangeably to denote the right of the Mixed Courts to hear cases.
15.MCA 4.2.1891 BLJ III p.179.
16.The one proviso was that the Tunisians must have been on an agreed list of Tunisians in Egypt in 1884;see notes 25 & 26 Chapter 3 for Moroccans and Algerians;most of these North African Arabs would have been Moslem but there seemed no consequent difficulty in allowing the Mixed Courts to have jurisdiction.
17.MCA 25.5.1892 BLJ IV p.294;i.e.Art.9 Judicial Rules,referred to in the notes throughout as 'ROJ'.The Règlement Général Judiciaire Mixte was enacted by Decree of 9.6.1887, and contained detailed provisions relating to court administration-referred to as General Rules in the text and RGJ in the notes.
18.e.g.MCA 17.5.1876 RO I p.67 & MCA 6.2.1879 RO IV p.119; see note 38 Chapter 3.
19.Estate of Cheikh Hassan El Ghergaoui v Mahmoud Abdalla & Hanafi Aly Ibrahim,31.1.1893.
20.Art.5 MCC;Art.9 ROJ.
21.The main decision was 23.1.1890 BLJ II p.191.
22.MCA 4.2.1891.
23.Decree of 12.7.1888,Art.5.
24.MCA 9.11.1892 Pres.Giaccone.
25.Amendment to Art.9 ROJ by Decree 26.3.1900.
26.MCA 27.12.1894.
27.Arts.331-340 MPC.
28.Art.12 & Art.14 of the Maison de Tolérance Regulations, 1.7.1885.
29.Tribunal des Contraventions d'Alex.,21.6.1886 Judge Timmermans.
30.Art.12 MCC.
31.Vercamer,La Juridiction Mixte Egyptienne,1911,Bruxelles, Emile Bruglant,p.16;Art.37 ROJ:La cour préparera le règlement général judiciaire en ce qui concerne la police de l'audience,la discipline des tribunaux,des officiers de

justice et des avocats,les devoirs des mandataires répres-entant les parties à l'audience,l'admission des personnes indigentes au bénéfice..du droit de récusation péremptoire, et la manière de procéder,en cas de partage des votes,pour les jugements de la cour d'appel.Le projet de règlement ainsi préparé sera transmis aux tribunaux de première instance pour leurs observations,et,après une nouvelle délibération de la cour qui sera définitive,rendu exécutoire par décret du Ministre de la justice.

32.MCA 27.1.1887.

33.Decree of 31.1.1889.

34.The point was carefully argued by El Rifai,Mouvement de la Reforme des Impôts Directs en Egypte,1929,Paris,Lib.Gen. de Droit et de Jurisprudence,pp.115-128.

35.Declaration of 17.3.1885.

36.Chirol,op.cit.,p.90.

37.Chirol,op.cit.,p.59.

38.MCA 22.5.1889 BLJ I p.152.

39.MCA 7.5.1890 BLJ II p.118.

40.MCA 4.1.1891 BLJ V p.5.

41.MCA 4.3.1891.

42.Procès Smarth,MCA 4.6.1891.

43.MCA 30.5.1894 BLJ VI p.272;see note 38 above for a previous case.

44.MCA 30.5.1894 BLJ VI p.272.

45.MCA 24.2.1892 BLJ IV p.272;in this case and the two cited in notes 46 & 47 below,together with the discussion on this point the word 'Arab' was used,as it is here,in place of 'Islamic',a more accurate description in fact than Arab.The year thus considered is the same lunar year.

46.MCA 2.2.1893 BLJ V p.118.

47.MCA 4.4.1895 BLJ VII p.214.

48.Art.275 MCC.

49.MCA 12.5.1892 BLJ IV p.235.

50.MCA 27.3.1889 BLJ I p.77.

51.MCA 8.5.1889 BLJ I p.110.

52.MCA 13.11.1889 BLJ II p.9.

53.Berque,op.cit.,p.191.

54.From an estimated £M LE in 1876-Salacuse,Back to Contract: Implications of Peace & Openness ,AJCL,1980,Vol.28,p.315.

55.At various times,but see especially Hansard,March 13th. 1882,s.776.

CHAPTER FIVE

1896 TO 1905.

Introduction.

The description of these years begins with The Further Development of the Theory of a Mixed Interest,continuing the discussion from the previous chapter.The next section looks at Government Sovereignty and Immunity,including the Dongola Expedition with its wide ramifications,and other matters of Government immunity. The chapter continues with Tax and the Mixed Courts,Trademarks, and Personal Status and the Mixed Courts.The section on General Jurisprudence provides further examples of topical cases,such as the fairness or otherwise of contracts,illegality,and champertous agreements.This leads to a discussion of the Structural Development of the Mixed Courts,reviewing events and cases contributing to the evolution of the framework of the courts.

The third decade saw a greater involvement in areas touching upon the lives of the ordinary inhabitants of Egypt.Although the events of the previous twenty years had also affected the residents of Egypt the law had begun to become established at a more personal level,and recourse to a court of law became an automatic factor to be considered,whereas in the years before 1875 it had been the very thing to avoid,not for the usual reasons always present in such matters,but simply because of the extreme unlikelihood of a fair trial.The Mixed Courts showed that a fair trial was not only possible but desirable.

The Further Development of the Theory of a Mixed Interest.

The years 1896 to 1905 saw no reduction in the Mixed Courts' control of litigation by use of the theory of a mixed interest.The most important such case in this period was another action concerning the Municipality of Alexandria. In the previous chapter this Municipality was discussed under the heading of Public Administration and Government Immunity,and it will be remembered that it was held that the Municipality was not part of the Egyptian Government[1]. The present case followed on from that decision and others concerning mixed interests,and involved local native subjects in an action over a compulsory purchase order of land for the construction of a road[2].The plaintiffs sought an order in the Mixed Courts forbidding the construction of the road without an agreement as to compensation,but in the event the only issue of importance was whether,as the Municipality and the Egyptian Government both argued,the Mixed Courts were not competent because both the plaintiffs and the defendant were native persons.

The judgements in the District Court and the Mixed Court of Appeal were carefully reasoned.In the Alexandria District Court it was first stated that all previous jurisprudence on the question of a mixed interest had to be considered, together with the letter and spirit of Art.9 of the Judicial Regulations.Continuing this theme the court held that previous decisions regarding the Domains,the Daira Sanieh,the Railways,the Suez Canal Company,Cairo Waterworks, the Credit Foncier,and the Ottoman Bank,amongst others,had established beyond doubt the principle that the competence of the Mixed Courts derived from the mixed nature of the interests in cause,and not just from the nationality of the parties.

The court then set out guidelines for the construction of a mixed interest.What was the origin of the Municipality and its avowed purpose?Who comprised the members and what was its authority?How and through whom did it operate? Considering these questions there was no doubt at all that

the Municipality had mixed interests and therefore the Mixed Courts were competent.

The reasoning thus far could have sufficed for the case in question,but the court went on to review other facts that were stated to be equally important,and these must be taken as equally forming the reasons behind the judgement.It was clear from the historical facts presented that the Capitulatory Powers were freely consulted by Zulficar Pasha before the Municipality was created in 1890.Indeed,France insisted on certain safeguards over taxation and other fiscal matters affecting her subjects, and the court reviewed the pre-inauguration discussions and concluded that none of the Capitulatory Powers could have intended such an organisation to be judged by the Native Courts.

In addition,the court looked much further than any possible causes in action and considered the work of the Municipality in administering the city of Alexandria to the benefit of its inhabitants,amongst whom were a very high proportion of foreigners.Outlining the importance of local administration for the wealth and prosperity of a city,the court stated that the welfare of Alexandria's foreign residents was thus so closely bound with the Municipality that there was a mixed interest in that respect.

The argument next dealt with was that by its decree of organisation the Municipality was declared to have a native nationality[3],and that consequently all disputes between it and natives should be heard by the Native Courts.The judges approached the point by assuming that the argument was correct.If therefore it was true,it would have been a renunciation of foreign established rights by taking away from the Mixed Courts cases that by agreed and tested precedent for many years were within their jurisdiction. Such a renunciation of established rights had to be beyond doubt,and the court stated that it was inconceivable that the Capitulatory Powers could have discussed the decree of organisation of the Municipality and accepted its terms,

knowing that the result would be a renunciation of rights, without having expressly or impliedly stated their agreement that the Municipality was to be subjected to the jurisdiction of the Native Court.The Alexandria District Court again referred to the preparatory discussions between Egypt and the Capitulatory Powers,and especially to the French insistence that the Municipality would 'above everything else'be a truly international organisation.All this,it was held,was incompatible with the competence of the Native Courts but completely consistent with that of the Mixed Courts,based on the theory of a mixed interest.

The case did not rest there but went to appeal.At this later stage the arguments and the reasons of the court developed on two lines.The first was straightforward and part of the continuing theory of mixed interest.The Municipality was held to be a civil person just like banks and other companies, and therefore the mixed interests it represented meant that the proper forum for disputes was the Mixed Courts.This was no more than a continuation of previous cases[4] quoted as direct authority,and it was reaffirmed that the nationality of a company was not conclusive as to jurisdiction.

The second argument was more original.The court held that it was wrong to consider a dual jurisdiction for an entity such as the Alexandria Municipality.If in disputes with natives the Native Courts had jurisdiction,and in disputes with foreigners the Mixed Courts were competent,the Municipality would have the bother and expense of fighting cases in two separate Egyptian courts with no guarantee that any one set of facts would meet with the same response in both courts.On the grounds that this was an inefficient way to organise a city the size of Alexandria,the Mixed Court of Appeal confirmed the decision of the Alexandria District Court and declared that only the Mixed Courts were competent.

Three matters of importance arise.In both the acceptance of previous decisions and the willingness to consider material arising out of preliminary conferences and the exchange of letters between Egyptian Government officials

and foreign Ministers,the courts showed a strong desire to follow their own cases and also to place issues in the context of Egyptian society and the appropriate background to the dispute.The third matter of importance is that the problem of a potential duality of jurisdiction was in fact solved by a decree in 1900 that altered the Codes to prevent natives suing the Municipality in the Mixed Courts[5].Thus the very duality of jurisdiction feared by the Mixed Court of Appeal actually arose.As it happened the type of dispute that concerned the Municipality was quite straightforward and clear,and there was no major clash between the Native and Mixed Courts in this area.

The decree of 1900 also covered other points about mixed interests that had been discussed at an international conference in 1898.The most objectionable practice from the Egyptian Government's point of view was the assignment of debts by natives to foreigners by which a mixed interest was introduced into a dispute , thus forcing the case to go before the Mixed Courts.

Before 1900,Art.436 of the Mixed Civil Code allowed an assignment of rights to third parties so long as the assignment was in writing and notified to the debtor,and the Mixed Courts were quite unwilling to refuse to hear actions that had developed a mixed interest even if they should have gone initially before the Native Courts.This meant that natives arranged to pursue their actions before the Mixed and not the Native Courts because of the much higher reputation of the former and the lack of experience of the latter.The only way to solve the dilemma was to provide the Native Courts with more judicial experience and thus raise their prestige.This was accomplished in relation to third party assignment by the new provision that no assignment of rights between natives could take place to a third party unless the debtor agreed[6].By this measure the Mixed Courts lost a certain amount of litigation, but so great were the demands on their facilities that in fact the change did not adversely affect them at all[7].

If a native creditor still wanted to bring his action against a native debtor before the Mixed Courts he could garnishee a foreigner who allegedly owed the debtor money. The new rule did not specifically stop that practice,although it clearly achieved what was intended so far as assignment was concerned.It was only when the Native Courts improved that natives stopped using all manner of devices to proceed before the Mixed Courts.

A further provision of the decree of 1900 made it clear,so as to avoid further litigation,that the reference in the Codes to persons of the same nationality in relation to real property[8] meant foreigners only and not native subjects. This point had already been well covered by decisions of the Mixed Courts and the new provision simply followed and codified the jurisprudence on this matter.

Generally therefore the theory of mixed interest had settled down by this time,but one more relevant case remains to be discussed.In 1905 the Egyptian Railways were sued by a native in the Mixed Courts[9] and following previous decisions that the Railways were covered by the mixed interest theory the plaintiff could confidently have expected to proceed in the Mixed Courts without difficulty.The court however declared itself incompetent because since 1904[10] the receipts from the Railways(and also those from the Telegraphs and Alexandria Port)were paid direct to the Egyptian Treasury and not used to pay off foreign creditors who had a charge over the receipts.

The natural consequence of this was to remove the mixed interest element from the Railway Administration,and thus it was held to be a native body,organised by the Egyptian authorities to run a railway,and in its dealings with natives could only be sued in the Native Courts.This case is interesting because it demonstrates objectivity in reasoning.The Mixed Courts did not simply gather to themselves all important litigation regardless of whether it belonged in the Mixed Courts or not,but they heard all cases that the law allowed.When the Railway receipts were

used to pay off foreign loans the Mixed Courts were entirely justified in hearing any railway cases because the circumstances showed a direct and actionable mixed interest.When this was no longer present the Mixed Courts just as swiftly declined jurisdiction and obliged the plaintiff to seek a remedy before the Native Courts.The result was a clear and objective application of the law, based on the Codes and jurisprudence,and it showed that the rules drawn up by the courts themselves to limit their own competence to hear cases were properly applied,regardless of the consequence that as large and important a carrier as the Railway was no longer within the jurisdiction of the Mixed Courts.

Government Sovereignty and Immunity.

The Dongola Expedition.

1896 saw an event which almost destroyed the Mixed Courts by upsetting the delicate balance of international and domestic support.It concerned the Caisse de la Dette,and basically revolved around the question of whether the Egyptian Government was entitled to spend the surplus money of the Caisse as it pleased. It will be remembered that the Caisse was set up in 1876 to regulate the repayment of foreign loans,and to channel certain government receipts into the Caisse for transmission to its bondholders.As such it was a clearing house for the money involved.

After some years the Caisse annually received more money than it needed,and the Egyptian Government was faced with increasing costs and no available resources. Accordingly in 1888[11],on the advice of Sir Edgar Vincent,the surplus money of the Caisse was placed in a Reserve Fund,to be used to reduce the standing debt when the fund reached £2M,but in the meantime to be used by the Egyptian Government for any extraordinary expenditure undertaken with the previous consent of the Commissioners of the Caisse[12].This provision was to cause the difficulty over Dongola.Before a detailed discussion of the case it would be useful to consider the background of the expedition.

After the Mahdi and his rebels had defeated British and Egyptian forces in Sudan,the country had gradually fallen into anarchy,and was seen both by the British and the Egyptians as a potential danger on Egypt's southern borders.Apart from the necessity to maintain law and order in Upper Egypt,the loss of Sudan had denied Egypt a huge trading area,and it was generally agreed that Sudan had to be reconquered.The problem was to find the money to equip and send a military expedition large enough to capture Dongola, strategically the most important town of Sudan.Whoever controlled

Dongola effectively controlled Sudan,and plans were set in motion to send an army,mostly Egyptian,south to capture the town.The money was obtained quite simply.The Egyptian Government was mindful of its right to draw on the reserves of the Caisse for extraordinary expenditure,and applied to the Commissioners for 500,000 LE on the 19th.March 1896.This was agreed in principle on the 26th.March by a majority of four to two,and 200,000 LE was paid over to the Egyptian Treasury.On the 18th.April a further 150,000 LE was paid.

The first payment,which was apparently in simple compliance with the rights of the Egyptian Government,unleashed a storm of protest.A syndicate of bondholders,in the main French subjects,sued the Commissioners of the Caisse and the Egyptian Government in the Mixed Courts,seeking a declaration that the money should be repaid.The two dissenting Commissioners,the French and Russian delegates, issued a writ seeking a declaration that they were not personally liable for the action of the majority,and the French Commissioner of the Domains Administration also formally intervened and protested against the payment, although his locus standi is not clear.On April 13th. another syndicate of bondholders joined issue,but this time to support the government and approve of the advance.

The case was closely watched.It was clear that the decision to advance the money was made routinely by the four Commissioners who agreed,and with the complete approval of the Egyptian and British Governments.Nevertheless France, whose own ambitions in Sudan had led to unsuccessful attempts to infiltrate her forces there,was adamant in opposition to the payments and a diplomatic row broke out. It was hardly helped when judgement was given against the Caisse and the Egyptian Government by the Cairo District Court on June 8th.Before formal notice of the judgement had been served the Government appealed,on June 11th.,and this appeal was heard in December,well after successul military operations had ceased but amid continuing concern at the initial decision.

Firstthough,what were the legal reasons behind the finding against the Government and the Caisse?The judgement started by setting out the procedural points necessary to elucidate the locus standi of all the parties who had,by the hearing date in the District Court,become parties to the action. The rest of the judgement may be split into two parts: competence of the Mixed Courts,and the reasons for declaring the advance of money illegal.

As to locus standi,in establishing the Caisse de la Dette the Egyptian Government and the Capitulatory Powers had agreed that matters relating to its legal position should be justiciable before the Mixed Courts,and that the Commissioners were the appropriate people to sue and be sued on behalf of the Caisse[12A].In this case however the majority of the Commissioners had approved the action and thus were defendants in the case rather than plaintiffs.Who therefore could sue on behalf of the bondholders represented by the Caisse?The rights of the individual creditors had been subordinated to the Caisse,and the appropriate articles indicate without doubt that individual bondholders had no locus standi.Nevertheless,a syndicate of them had sued and the court declared,in a deliberate attempt to give the syndicate the right to bring the action,that the Commissioners were only agents of the bondholders and thus their principals(the bondholders)could sue in their place.

This was not in accordance with the relevant articles,and can only be explained on the basis that a rejection of the action on technical grounds at that stage would have been an unnecessary and inconsistent adherence to strict procedural rules,especially given that the Mixed Courts did not generally take a hard view of procedure.In fact,as the Mixed Court of Appeal later decided,the relevant articles could be interpreted to allow the minority Commissioners a right to sue on behalf of the bondholders,and so this procedural error could have been properly adjusted at first instance without stretching the law.It would also have dealt with bondholders taking action in support of the Caisse.

As to competence the Egyptian Government claimed that the request for and receipt of the money was a sovereign act which could not be judged by the Mixed Courts.In their turn the Commissioners of the Caisse claimed that in exercising their rights to advance money they were carrying out a political act akin to the spending of money by a parliament,and thus were immune from censure by the courts.

Professor Dicey prepared a long opinion on behalf of the Egyptian Government which tried to define the Government's military action as one of sovereignty,but in fact this was not the point.It was the advance of the money and not the decision to reconquer Sudan that had been challenged.Clearly, in sending a military expedition to Dongola the Egyptian Government was exercising its sovereign right,and the expedition itself could not therefore be challenged in the courts because of that.The jurisprudence of the Mixed Courts, it will be remembered,declined to allow judicial control of sovereign acts.

The advance of money was not a question of sovereignty, however,because it was an advance by the Caisse,which was not a parliamentary authority but a group of Commissioners paid by the Egyptian Government and nominated by the Capitulatory Powers to supervise the orderly repayment of Egypt's foreign loans.Consequently it was held that they could not claim any immunity on political grounds[13].

The question then became one of interpreting the decrees establishing the Caisse to see whether the advance of money was within the Commissioners' powers or not.To commence,the court declared that the totality of a debt guaranteed each part of it[14],that is to say that no part of a debt,however small,could be dealt with if it prejudiced the whole.It is not clear what this statement was meant to add to the issue.The actual question was the interpretation of the 1888 decree,and thus the statement fails to have an obvious place in the judgement.Despite that it did form part of the reasoning of the District Court.The real

point was whether the advance was valid,and this depended on whether it was for extraordinary purposes,that is purposes over and above the usual day to day necessities of financing the Egyptian administration,in short-des dépenses extraordinaires.

This caused the court to decide what,for the purposes of the case,was an extraordinary purpose.It might be thought that the financing of a military expedition was extraordinary, but the judges had in mind more domestic matters such as an unexpected flooding of the Nile,or the loss of government buildings by fire.The Egyptian Government and the majority Commissioners stuck to the idea that extraordinary should be given its usual meaning,and reaffirmed their view that this naturally covered financing a military expedition to reconquer Sudan for Egypt,a venture clearly out of the ordinary pattern of events.

The question of benefit to Egypt was also argued.If it is accepted that the bondholders' interests were paramount,it is necessary to assess the benefit to them,directly or indirectly,of recovering Sudan.In fact there can have been no doubt at all that the retaking of Sudan was of great material benefit to Egypt and thus indirectly to her creditors,but this should not have been the question.It was nonetheless argued by both sides and it is safe to say that only the bondholders who disapproved of the advance,and the French observers,were prepared to deny that recovering Sudan was a material advantage to Egypt.

The next stage was to consider the evidence in favour of interpreting the phrase 'dépenses extraordinaires'.How was the court to decide what was extraordinary expenditure as envisaged by the 1888 decree?The answer was to treat it as a matter of contract law and establish what was the intention of the parties at the time the Reserve Fund was established.The court considered a wide range of evidence, including the writings of Milner,and the exchange of letters between the Egyptian Government and the Caisse.Its conclusion was that the Reserve Fund was for fortuitous accidents only,

and not for deliberately planned military expeditions, especially as no express mention had been made of Sudan in 1888.

Against this simplistic view was a great deal of counter evidence.Cromer stated [15] that it was always contemplated in Government circles that Sudan should be recovered and that the Reserve Fund could be used to pay for an army to do so.Nubar,in a Circular to the Capitulatory Powers[16] suggested that the Fund should be 'destiné à parer à toutes les eventualités' and in another Circular[17] clarified his statement and said that the Fund would be for all extraordinary expenditure which might otherwise upset Egypt's balanced budget.The weight of this evidence was ignored by the court and judgement was given against the defendants,together with interest at 5% per annum from the date of the advances.

It is submitted that the decision was neither in tune with the spirit nor the letter of the law.If one accepts the matter as one of contractual interpretation there is no need to deviate from a straightforward and natural interpretation,and this leads on to an examination of the type of extraordinary things permitted.This inescapably allowed the Egyptian Government to draw on the Reserve Fund for expenditure out of the ordinary which would otherwise upset the balance of Egypt's budget,and this must have included the Dongola expedition.The court was,of course,quite right to reject the defence of sovereign immunity.

Could there have been political reasons for the decision? The President of the Cairo District Court was Casimir Prunières,a Frenchman who had been appointed a judge in 1884.His fellow judges were de Stoppelaar,an ex-judge from Holland,de Sande e Castro,an ex-judge from Portugal,and Ismail Bey Serri and Youssef Bey Aziz,both well qualified Egyptian judges.It is hard to imagine that they would all have been subject to political pressure against the Egyptian Government and its British ally,but as verdicts were by a majority it is possible that Prunières,assuming he followed

the dogmatic French line over the money,was able to persuade at least two of his colleagues to agree with him.Dissenting judgements were never given,and so the political question can not be finally settled.Leaving aside the judgement however let us examine the consequences.

The decision caused a storm of protest in England.The Chancellor of the Exchequer himself was of the opinion that the Mixed Courts had overstepped their mark and had 'usurped authority which ought not to belong to them'[18]. The decision also caused astonishment and resentment in Egypt,but in time the criticism abated.It is worth noting that the court,although it may have decided against the weight of evidence,was perfectly entitled to judge the matter because it concerned the Caisse which was expressly, by treaty,within its jurisdiction.The court had no jurisdiction to hear disputes over sovereign acts,and the criticism of the Mixed Courts for interfering in a sovereign matter was illfounded;any criticism should have been directed at the illogicality of the decision and not at the competence of the court.The Egyptian Government's right to recapture Dongola was not in issue.

The political consequences for Egypt and Sudan were more important.The British Government,seeing the likelihood that the appeal would fail,felt bound to promise the Egyptian Government the money so that it would not get into financial difficulties.The day after the Mixed Court of Appeal upheld the Cairo District Court[19] the full sum in dispute was handed to the Egyptian Treasury by the British Government.This was to be the signal for a much more overt involvement in Sudan by the British.It would be incorrect to suggest that the British had had no interest in Sudan at all.On the contrary,it had been the English Advisers who had helped Egypt plan and execute the reconquest, but British assistance had been on behalf of Egypt,and Dongola was seen as a purely Egyptian affair.When the Mixed Courts' decisions forced the British to pay for the expedition by way of a nominal loan to Egypt it was felt

that an overt and much greater participation in the new Sudan province was justified and British interest,now as a partner and not just a supporter,manifested itself in the 1899 Anglo-Egyptian Condominium Agreement to rule Sudan jointly.

It is fair to say that without the spur of the Mixed Court judgement the British involvement in Sudan would probably have remained in the background,but the two decisions and their attendant publicity allowed Britain to take an active and obvious role.

Although Sudan was ruled by Egypt as a joint partner the Agreement specifically excluded the application of Egypt's treaties and usage to Sudan,and thus the Mixed Courts had no authority at all in the Condominium.Although Sudanese law developed along joint English and Egyptian lines it cannot be said that Sudanese law was directly influenced by the Mixed Courts,although in later years some Mixed law was used in appropriate disputes[19A].

Other Government cases.

Apart from the Dongola affair there were two other cases of interest concerning government responsibility.In 1896 a certain Friedmann sued[20] the Egyptian Government for damages,alleging that he had been prejudiced by the giving up of Madian to Turkey.It will be remembered that Zobeir Pasha attempted a similar action in 1891 and failed[21].The court in 1896 followed the jurisprudence regulating government responsibility in such circumstances,and held the cession of territory to another state to be an act of public power and sovereignty and one that could neither be controlled nor judged by the Mixed Courts.

This case may be compared with the Dongola affair,where the court decided against the Government,and while it may be difficult to see how a military expedition to recover territory was any the less a matter of sovereignty than the act of giving up territory,it must be remembered that in essence the Dongola case was actually a question of the

rights of the Commissioners of the Caisse,and not an issue of sovereignty although it was treated as such by the Egyptian Government at first,and the Caisse in the argument put forward of political immunity,and by many of the critical observers.

The final case involving the Government was more to do with the distinction between the Khedive as head of state and as a private person.The Egyptian Government had agreed with the promoters of the Khedivial Mail Line Steamship Company Ltd. that on the sale to the promoters of certain government vessels the Egyptian Government would not compete for passengers or cargo on the Mail Line's Mediterranean or Red Sea services.

First of all this restraint clause in the contract was permissible under Egyptian law.The problem arose because the government sold another vessel,the 'Behera',to the Daira Khassa of the Khedive,and the estate management set about using it for transporting pilgrims across the Red Sea.This was competition for the Mail Line,and it sought a declaration in the Mixed Courts that the use of the 'Behera' by the Khedive's estates was contrary to the original contract of sale of other vessels to the Mail Line,and so should be stopped.

The whole of the plaintiff's case rested on whether the Khedive as head of the Egyptian Government was the same juristic person when head of his own estates.If he was, then clearly the Government had broken their contractual obligation not to compete with the new owners of the Mail Line ships.Both the Cairo District Court and the Mixed Court of Appeal[22] held that this argument failed.The Khedive as head of state was not the Khedive as head of his own estates,and thus as a third party to the original contract between the Government and the Mail Line he could do as he pleased with the 'Behera'.

In this instance the Khedive benefitted from the separation of the private and public capacity of the head of state.The judgement is also interesting for the reluctance of the courts to extend a restraint clause so widely as to extinguish or hamper free trade.Freedom of commerce was too important.

Tax and the Mixed Courts.

Only one case of any note on tax was decided in the Mixed Courts between 1896 and 1905.In 1901 the Egyptian government imposed an 8% ad valorem tax on locally produced cotton fabric[23].The reason behind this move was to match the general charges levied on imported cotton goods,and so reduce the price advantage of local products as against their rivals from England and India.This tax not surprisingly upset the owners of Egyptian cotton factories,and one English owner sought and obtained a declaration in the Alexandria District Court that the tax was not applicable to foreign owned cotton mills because it had not been approved or agreed by the Capitulatory Powers.

The decision begged the question as to whether foreigners were exempt from some or all taxes.If they were in this case,Egyptian owned cotton factories would be at a disadvantage as against foreign owned ones,which would still be ahead in competitive terms of all their overseas rivals.

On appeal[24]it was held that the tax was payable.In a judgement that did not decide one way or the other regarding all taxes on foreigners in Egypt,the court clearly refused the plaintiff's contention that he was under no obligation to pay the tax.Stating that the 8% tax was simply an excise duty or internal consumer tax the court held that it did not go against treaties or usage,nor was such a tax to be approved by the General Assembly of the Mixed Courts before it could be imposed.

However,before this final judgement was given,the Egyptian Government were asked to declare at the bar of the court that the tax would be repaid if the goods were exported.This was something not provided for in the decree,and was considered essential for judicial approval of the tax.The case is worth noting in that a perceived defect in the law was cured by a declaration by an official in

court.Presumably the sanction if this declaration had been ignored later was that the court could declare,on a motion brought for that purpose,that the tax was illegal.This appears to be the first time that such a course was taken,and it shows a willingness to smooth away difficulties in legislation,and so allow a purposive interpretation of decrees.This was entirely consistent with the approach previously taken with regard to interpretation,and worked extremely well in the present case.

Trademarks.

Concern over trademark infringement in Egypt had increased by the turn of the century.In 1896 the problem was viewed with alarm in England as the good name of English products suffered,and this form of commercial brigandage,as it was called at the time,involved many deliberate passing-off operations.Details were given to the House of Commons of Sheffield Cutlery from Austria,English Pale Ale brewed in Germany and Belgium,Scottish whisky locally brewed by Levantine traders,and English patent medicines from Italy[25]. All these and many other products were on sale in Egypt. The above examples were only some of the varied and damaging instances of trademark infringement,and proposals were put forward for an early reassembly of the International Union for the Protection of Industrial Property and the Repression of False Trade Descriptions[26].

The major problem in Egypt was one of penal jurisdiction. The Mixed Courts were able to award damages and order the confiscation of offending articles,but they could do nothing in the field of criminal law because the Police Regulations did not cover intellectual or industrial property,and all other offences(such as fraud,deception,theft)were still within the jurisdiction of the consular courts who generally lacked both the will and the expertise to take any action against their nationals.

In the event no agreement was reached between the Capitulatory Powers on any uniform penal application of trademark laws, and it was left to the Mixed Courts to stem the flow of illegal goods into and within Egypt by awarding damages and seizing property.Many such actions were taken,and all relied on the inherent power of the court under the application of the rules of natural law and equity.In addition the court could refer to previous decisions in favour of the owners of trademarks.

The main case of the period concerned a defence to an action of passing-off cotton reels.The defendant pleaded that on the reels concerned there was writing to the effect that the trademark shown was not the correct one,and so he

argued that there could be no action against him because he had expressly disclaimed the use of the mark.This defence was decisevely rejected.The court held that its duty was to protect people who could not read European words and to prevent fraud and confusion.It might have been a valid argument,the court said,in Germany or Austria where everyone could read,to have a written disclaimer on goods to prevent confusion,but in Egypt the small traders and their customers relied heavily on emblems to identify foreign goods,and so the use of the emblem itself was important.In the circumstances therefore the claim against the defendant was upheld, and his written disclaimer was held to be of no effect[27].

Once again the Mixed Courts showed their refusal to accept technical defences,and looked to the inspiration of natural law and equity,which in this case provided for the protection of bona fide purchasers.These principles allowed a useful jurisprudence to continue to develop in the field of trademarks and allied subjects,and the aim of public protection was achieved.It is in addition interesting to note that many of the judgements stated an objection to trademark infringement based on a disapproval of unfair trading, concurrence deloyale,as much as on a desire to protect property rights.Whatever the reasons however trademarks were gradually regulated by this judgemade law.

Personal Status and the Mixed Courts.

Personal status matters were outside the competence of the Mixed Courts[28],but it often fell to them to decide on conflicting views of what a person's personal status was. In the absence of any proper procedure for the resolution of conflicts between consular courts and the Mixed,Native or Sharia Courts the Egyptian Government occasionally suspended enforcement of,for example,judgements of the Native and Sharia Courts when there was a conflict and appointed a committee to decide on the correct result.

If the case concerned a foreigner the Mixed Courts usually stated what they considered the correct law was and what consequences their conclusion entailed.In this respect they began to encroach on the territory of the consular courts,but it can be said that this was with the intention of avoiding a situation where there was no binding judgement at all because of a conflict.

These matters therefore began to be settled by the Mixed Courts towards the 1900s.Most of the cases involved deciding what nationality a foreign woman had when she married an Ottoman subject.As a preliminary to accepting jurisdiction this was a valid question for the Mixed Courts to decide,but of course it was a question that often comprised the whole case and not just a preliminary part. The cases mostly arose in relation to French and Italian women and were decided by treating them as having kept their foreign nationality.This accorded with what the Mixed Court judiciary viewed as French and Italian law,whereby French and Italian women only lost their nationality if they gained an Ottoman one.Unfortunately for a universal acceptance of this principle the French Consular Court held in one case that a Frenchwoman who married a Turk became Turkish[29]regardless of whether the Ottoman Empire regarded her as such or not.

As for English women the 1870 Nationality Act made them subjects of their husband's state,and the British Consular Courts treated women who married Ottomans as Ottoman.Problems arose by virtue of English law rules against polygamous marriages.A moslem Ottoman male had a right to take more

than one wife-was his marriage to an Englishwoman lawful? At this stage in the history of the Mixed Courts the judges were prepared to look at the views of foreign lawyers and courts,and decide only between one nationality and the other,except in the clearest case,such as that of divorce.Their excursion into personal status matters was not a valid departure from their already generously defined jurisdiction and did not,in the long run,have a major contribution for Egyptian jurisprudence,save in so far as the same spirit of equity and natural justice was to the fore in considering disputes.This meant that in most cases the effect of a decision in personal status matters was carefully thought out.

The only case of note decided that the former wife of a Greek subject could only opt for Ottoman nationality and bring her case in the Native Courts if the divorce had been correctly made,and she had been an Ottoman subject before marriage.The only principle to be gleaned from this case was that marriage could,depending on the circumstances,be treated as a matter of contract,and that therefore once a marriage was over the wife could,at her choice,revert to her former Ottoman nationality[30].

It is timely to mention that the problem of mixed marriages was so great that the Grand Qadi of Egypt instructed his officials to explain carefully basic Sharia principles to Christian and Jewish women marrying Moslems.The problems of these mixed marriages were beyond the control of any of the existing courts, and it was to be many years before any suitable legislation aided the difficulties.In the maantime the Mixed Courts did what they saw as their duty to resolve the issues.

The disadvantage was that the Mixed Court judiciary had little experience in personal status matters and could only, at best,come to a decision on conflicting opinions from the personal status courts or the parties' expert religious witnesses.To do more was to enter a complicated field without authority.In later years foreign political changes gave the Mixed Courts more valid reasons for deciding personal status questions.

General Jurisprudence.

By 1896 the Mixed Courts had had many years to get over the basic points of competence, mixed interest, government immunity, and intellectual and industrial property, and had begun to develop a commercial jurisprudence along wider and broader lines. This is in no way to minimise the importance of the former categories, but an important jurisprudence built up on more basic commercial matters.

The first such case of this period concerned a deed. A debtor borrowed money from a person who asked that a deed be signed by the debtor to acknowledge the loan. The debtor wrote on the deed in Hebrew 'does not accept', and handed it back. The creditor did not understand Hebrew, and mistakenly thought the deed was in order. Later, in an action on it, the defendant debtor claimed that he was not liable on the instrument because of the words he had used. The court rejected this argument. It was held that this use of Hebrew fraudulently induced an operative mistake on the part of the creditor, and was thus to be ignored in an action for the recovery of the loan. The debtor was liable despite his phrasing of the deed[31].

In the circumstances this was the only possible just solution. In not being bound by what was on the face of the document, but in seeking the truth behind the deed and judging the issue in that manner, the Mixed Courts maintained their policy against fraud and kept their reputation for justice.

The next case was more basic. As an inducement to contract with them, the Cairo Gasworks allowed new private customers a substantial discount on gas supplies. The Government was also a customer of the Gasworks, under an earlier contract, and it claimed to be entitled to the same discount as private individuals were allowed. This contention was not accepted. It was held to be a pure matter of business practice whether one customer received a discount or not, and the Mixed Court of Appeal refused to rewrite the Egyptian Government's contract with the Gasworks[32].

The problem of when the court would rewrite an unconscionable bargain was not easily solved. After all, the spirit of free trade was recognised as contributing to Egypt's prosperity, and the Mixed Courts were reluctant to interfere with contracts. In the question of salvage fees however they laid down the rule that the fees were not to be exorbitant, and stated that an agreement would be annulled if it was clear from the facts that the Master of a saved vessel had not freely agreed the salvor's payment[33]. It was made clear though that rewriting of a contract would not take place, even if equity prompted such an approach, if it had been freely agreed[34]. The Mixed Courts did not protect parties from unwise or foolish bargains, but this must be seen in the context of free agreement, especially the absence of duress, and in the light of the necessity under the Codes for the obligation to be lawful[35]. If a debtor alleged his loan was unlawful, for instance because it was for gambling debts, or if a party otherwise alleged illegality, it was for that party to prove the allegation. If that could not be done there was a presumption that the agreement was lawful[36].

Gambling debts were not approved by the Mixed Courts. They were regarded as against the rules of equity and natural law, and unenforceable[37]. Nor was it possible for a gambling debtor to ratify the debt in another form so as to create an enforceable obligation, because the element of gambling went to the root of the contract and meant that everything flowing from it was tainted with illegality[38].

If however a gambling debt had been paid, the Mixed Courts did not take their disapproval so far as to order its repayment. This was also held in a case over jeux de bourse, or gambling on the Stock Exchange, where the duty to pay was held to be unenforceable by law, but a natural obligation so that if payment had been made it need not be repaid[39].

Another field that began to have attention focused on it was that of arbitration.Despite the immense confidence in the Mixed Courts some merchants, accepting the continued use of the Mixed Codes and jurisprudence,preferred to settle their disputes privately,and chose or agreed arbitrators to apply the law to their disputes.The award was usually stated to be final and without recourse to the courts,but despite such clauses the Mixed Courts exercised a supervisory role over arbitrations and intervened where public policy demanded,for instance if there was misconduct of the arbitration.

Misconduct was judged as acting outside the powers granted,not answering points submitted,not hearing defences,and any similar faults[40].In this way the Mixed Courts maintained judicial control of arbitration. The relevant articles in the Codes[41]did not provide for the intervention of the courts,although the provisions are otherwise helpful,and therefore the Mixed Courts had to develop rules of law for the conduct of arbitrations.In this area they maintained their recognition of the rules of natural law and equity,and thus began a truly commercial process of private resolution of disputes with overall court supervision. The use of arbitrators was not as widespread as might have been though given the enormous amount of trade and huge numbers of traders in Egypt,because the Mixed Courts sat,as has been mentioned earlier,with lay assessors in commercial cases.Court decisions were also given speedily,and thus the only real advantage of arbitration was privacy,which was itself difficult to ensure in as close a commercial community as existed in Egypt,especially in Alexandria.

The next two cases concern duress.One escape mentioned above for evading a contract was to show that it was not freely entered.The Mixed Courts could also use the principle of duress as set out in the Codes[42].In a case where a creditor forced a father to pay his son's debts to save the family honour,it was held that this

was not duress because a father should pay his son's debts. The principle of duress could not be stretched to cover such a payment[43].The same court declared that it was quite permissible to threaten a debtor with bankruptcy so long as no attempt was made to get more money than was actually due[44].All other cases involving alleged duress were decided in the same robust manner,and the Mixed Courts needed a great deal of convincing before they were prepared to release parties from their obligations.It made no difference whether the duress was physical,economic or social.

The Mixed Courts did however intervene in cases where contracts were not freely entered into by being prepared to rectify those agreements where one party was not able to bargain properly because of some unfair advantage of the other side.This included the deliberate concealment of material facts as well as taking advantage of those with less education or wit.In 1902 some poor and illiterate Turks assigned certain claims to a Greek for a sum well below their market value.The Mixed Court had no hesitation in setting aside the assignment because of a concealment of material facts by the assignee[45].The decision relied on the reasoning that in the absence of proper disclosure in such circumstances the assignor could not have known what he was doing.This was thus a similar argument to that of non est factum.

Clearly,no protection would have been advanced to someone who carelessly failed to discover,or did not realise the importance of,material facts.Nevertheless,this case did not represent a general willingness to interfere and rewrite parties' bargains,but simply a policy that injustice should not be allowed to be done through the judicial process.

The next case was a dispute over champertous contracts. These arrangements by lawyers were considered to be against public policy,and it was held that the same view applied to agents entrusted with looking after litigation or otherwise acting on behalf of a litigant.Public policy also applied to any agreement to share the subject matter of the action (as against taking part of its monetary value)which was seen as champertous and not allowed.

Another rule forbad lawyers or employees of the courts,such as judges,greffiers,and huissiers,from buying rights in litigation that was being heard or had been set down for trial in the area where they worked.Any such sale was an absolute nullity[46] and the Mixed Courts held all these restrictions to apply as strictly to agents of litigants[47]. In upholding strict professional rules of conduct and payment the judiciary ensured a proper standard of behaviour in legal matters for all entrusted with an action.

A later case involved the Mixed Courts in deciding the effect of a contract to supply water to the Egyptian Government[48].The Government had granted a concession to the Cairo Waterworks for the supply of water and had agreed to buy its water from the company.The latter sued the Government when it discovered that the Government had bored its own wells and collected rainwater in tanks,for the use of soldiers in certain barracks.The company alleged that these actions contravened the agreement to buy water from the Waterworks,but the Mixed Court of Appeal had no difficulty in finding that while the Egyptian Government could only buy water from the Waterworks,nothing in the agreement could be taken to forbid it from finding its own free sources of water if it wished.

The influence of Islam must have prompted the provision in the Mixed Civil Code that the sale of crops and fruit which had not yet sprouted was void[49].The rule meant that farmers could not sell their crop before it had grown,but the sale of unharvested crops was often a necessity in Egypt in order to raise money to actually harvest them.This rule therefore,originally conceived to prevent speculation to the farmers' detriment,was not in line with Egyptian agricultural custom,and the article was interpreted to allow agreements to sell the crop at the market price on the day of delivery[50].This arrangement secured a sale but avoided premature speculation,and the Mixed Courts thus interpreted the rule as being one to protect the farmer.If he chose expressly to waive the nullity that operated in his favour the courts concurred and allowed the sale[51].

Moving to the topic of bankruptcy, most of the cases were uneventful, but one is of interest. Creditors were allowed to sue in their debtor's name to enforce contracts against third parties[52], but it was held that this could only be done if the action was likely to increase the estate available for distribution[53]. This stopped the many futile actions against third parties, whose only result was the further reduction of money available to distribute amongst the creditors.

Structural Development of the Mixed Courts.

It had become clear that some reforms were necessary,for example in bankruptcy matters,because the penalties available were limited to civil remedies without any means of punishing bankrupts where such a course would have been appropriate. By a Decree of March 26th.1900 the Mixed Courts were given jurisdiction over simple and fraudulent bankruptcy offences committed by bankrupts appearing before them.The offences were classified as delicts for procedural reasons so that the need for calling a jury was avoided,as this was only done for crimes.A council of Mixed Court judges sat as Examining Magistrates to review each case,and this reform helped in a small way to enforce bankruptcy laws and to extend the penal jurisdiction of the Mixed Courts.

In 1901 it was held that mere registration of a title deed did not cure any vices of title,but did act as publicity to enable others to be put on notice[54].Thus the juridiction gracieuse of the Mixed Courts did not actually guarantee title simply by registration,but rather allowed certain rebuttable presumptions to be raised.

It is also worth noting that a decision in 1896[55] stated that the Mixed Courts would not take account of other courts' decisions,revealing the attitude that any case before the Mixed Courts would be decided solely by reference to their laws and jurisprudence.This must be viewed however as a reluctance to feel bound to follow other courts,rather than a complete rejection of everything other courts might decide.

In 1905 a Circular of the Mixed Court of Appeal,of Jan.15th., added English as an official language of the Mixed Courts. This pleased those English officials who had long campaigned for such a move,but in fact it did little to increase English legal influence,and few cases were ever heard in English throughout.The main difficulty was that while some greffiers and judges understood English,most witnesses and court officials did not do so fully enough for all proceedings to be conducted in English without excessive interpretation, and the change was largely ineffective.

Lastly,by a Decree of the 1st.March 1901,career diplomats,who had before then been immune from suit in the Mixed Courts,were allowed to sue as plaintiff in all civil cases,and to be sued in counter-claim up to the amount of the claim[56].This remedied the situation that had arisen because the Mixed Courts had viewed the immunity of diplomats from their jurisdiction to mean that they could not sue as well as not being sued.In addition,the new law allowed actions for all commercial cases involving diplomats,and all land unless it comprised part of the represented state's official holdings.At the same time the religious establishments of France and Austria obtained similar agreements for their litigation.

All other consular agents were liable for non-consular acts.This law tidied up the remaining abuses of consular and diplomatic immunity,and brought more work to the Mixed Courts,placing the diplomats and religious institutions on a more equal footing with local residents.

Notes to Chapter 5.

1.MCA 9.11.1892;see note 24,Chapter 4.
2.Dame Hoyanni & Houri v Municipality of Alexandria & Egyptian Government,MCA 12.3.1896 Pres.Korizmics,following Alexandria District Court 8.4.1895.
3.Art.13 Decree 1890:'La commission municipale d'Alexandrie constitue une personnalité civile de nationalité indigène'.
4.'...la municipalité d'Alexandrie constitue,non pas une administration gouvernementale(arrêts des 8 Nov.1892 et 15 Nov.1893),mais une personne civile ayant des droits et interèts propre...'
5.Amendment to Art.9 ROJ by Decree,26.3.1900:'La municipalité d'Alexandrie dans ses rapports avec des indigènes,n'est pas justiciables des tribunaux mixtes'.
6.Amendment to Art.436 MCC by Decree,26.3.1900:'Neanmoins les obligations purement civiles,nées entre indigènes,ne pourront être cédées qu'avec le consentement du débiteur, lequel ne pourra être établi que par écrit ou par délation de serment'.
7.Undoubtedly the new work for the Native Courts helped them to gain valuable experience,and the jurisprudence of the Mixed Courts was closely followed.The practice of assigning debts to third parties had developed into a form of negotiable instrument-see Worsfold,The Redemption of Egypt,1899, London,George Allen,p.172.
8.Art.5 MCC;Art.9 ROJ.
9.Younes Ibrahim v Egyptian Railways Administration,1905-no more specific date is available.
10.Decree of 28.11.1904.
11.Decree of 12.7.1888.
12.Art.3(3)ibid.:'A des dèpenses extraordinaires engagées conformement à l'avis préalable de la Commission de la Dette'.
12A.Art.38 Law of Liquidation 17.7.1880;Art.4 Decree of 2.5.1876.
13.'Attendu que les rapports entre le Gouvernement Egyptien, emprunteur,et les porteurs de titres,prêteurs,sont régis par une série de Décrets...Attendu qu'il a déja été établi que les dits Commissaires n'avaient pas de mandats politiques dans leurs rapports avec les porteurs de titres et que leur mandat était régi par le droit commun'.

14.Following Art.669 MCC.
15.Official Report Egypt(No.1),1897,London,HMSO,p.43 et seq.
16.19.1.1888.
17.3.3.1888.
18.See JCL,1896,Vol.I,p.403;the Mixed Courts were also accused of exercising political authority as if they were a type of American Supreme Court,see Traill,Lord Cromer-A Biography,1897,London,Bliss Sands & Co.,p.279.
19.MCA 2.12.1896 Pres.Bellet.
19A.See Chapter 7 notes 87,88,89;Chapter 8 note 115.
20.MCA 11.3.1896.
21.MCA 4.2.1891;see Chapter 4 note 22.
22.Cairo District Court 10.2.1903 Pres.Herzbruck;MCA 13.5.1903 Pres.de Korizmics.
23.Decree of 13.4.1901.
24.MCA 20.2.1902 Pres.de Korizmics BLJ XIV p.147.
25.Hansard,24.4.1896,s.1635.
26.Ibid.,s.1636 & s.1731.
27.MCA 2.12.1903 BLJ XVI p.25.
28.Art.4 MCC;Art.9 ROJ.
29.See JCL,1902,Vol.4,p.93.
30.MCA 1.6.1897 BLJ IX p.373;the divorce had to be valid by Greek law.
31.MCA 20.2.1896 BLJ VIII p.132.
32.MCA 3.6.1896 Pres.Bellet,from Cairo District Court 2.3.1896 Pres.Prunières.
33.MCA 22.3.1899 BLJ XI p.166.
34.MCA 3.6.1896 BLJ VIII p.313.
35.Art.148 MCC:L'obligation n'existe que si elle a une cause certaine et licite;Art.149 MCC.
36.MCA 10.3.1897 BLJ IX p.190.
37.MCA 25.1.1897 BLJ IX p.194,following the first major case on gambling-MCA 28.3.1878 RO III p.167.
38.MCA 1902 BLJ XIV p.134.
39.MCA 6.1.1903 BLJ XV p.79.
40.MCA 15.4.1896 BLJ VIII p.207.
41.Art.791-Art.816 MC Civ.Proc.
42.Art.195 MCC:La violence,pour être cause de nullité, doit être assez grave pour faire impression sur une personne raisonnable,étant tenu compte de l'âge,du sexe,et de la condition du contractant.

43.MCA 16.12.1896 BLJ IX p.58.
44.Ibid.
45.MCA 12.6.1902 BLJ XIV p.347.
46.Art.324 MCC;the rule may be contrasted with that of French law where the contract was merely voidable.
47.MCA 24.12.1896 RO XXII p.96.
48.MCA 5.1.1897 Pres.d'Abaza.
49.Art.330 MCC:La vente des fruits d'un arbre,quand ils ne sont pas poussés,ou d'une récolte qui n'est pas encore sortie de terre,est nulle;see Chapter 2 note 19;Chapter 6 n.41.
50.MCA 15.2.1900 BLJ XII p.117.
51.MCA 4.2.1904 BLJ XVI p.131.
52.Art.202 MCC.
53.MCA 10.6.1903 BLJ XV p.343.
54.MCA 21.2.1901 BLJ XIII p.171;this notice was a type of constructive notice.
55.MCA 8.1.1896.
56.This was based on a German law of 27.1.1877,and the deliberations of the Institute of International Law at Cambridge in 1895.

CHAPTER SIX

1906 TO 1915.

Introduction.

The first subject considered is Government Immunity,including a case on the immunity of the Greek Government,and continuing the chapter is The Mixed Courts and Taxation,followed by the Mixed Courts and Company Law.The effects of the British Protectorate and the Ist.World War are considered,leading to a review of Foreigners and the Mixed Courts.This topic started with the changes in political systems in the Middle East and Mediterranean, and led later to a much wider theory of foreign nationality. General Jurisprudence starts with worker compensation and discusses,amongst other topics,the application of natural law and equity,sales of future crops,maritime trade,damages,hire-purchase,mistake,and legal aid.The chapter concludes with a discussion on the Structural Development of the Courts,and a brief section on nationalist pressure for change in Egyptian Nationalism and the Mixed Courts.

The position of the Mixed Courts at this time seemed unassailable. Their control of the commercial life of Egypt,together with their clear lead over the alternative court systems,and their policy of basing judgements on sound and valid precedent and learning,meant that their decisions were regarded as a true reflection of the right way to act.Unfortunately,the risk of decisions of the Mixed Court of Appeals being in conflict,and the fact that,while highly persuasive,the judgements of the Mixed Court of Appeals were not binding on the District Courts, meant that a system of formally binding precedent was necessary, and this was fulfilled by the plenary session of the Mixed Court of Appeal.Such a move further consolidated the respect for judge made law,and avoided serious conflict.

Government Immunity.

The years leading up to the Ist.World War had few cases involving government immunity or responsibility. The war was to lead to a great number of disputes connected with government immunity,but the years from 1906 to 1915 only saw three cases of note.

The first was a claim by the descendants of the Khedive Ismail to a share in the proceeds from the sale of the assets of the Daira Sanieh.An attempt to secure this had first been made in 1905,and it was finally decided by the Cairo District Court in 1909.The descendants' claim was that they were entitled to a share in the sale money because the Daira Sanieh belonged to Ismail and his family,and as they were his heirs they were the rightful owners.

Reflecting the magnitude of their claim,a distinguished panel of experts was drafted to advise,including Maître Tommaso Villa,an ex-Minister of Italy,Herbert Asquith, who later became British Prime Minister,and Raymond Poincaré,later French President.Despite the standing of the authors of the opinions supporting Ismail's heirs,their claim was refused by the court,on the basis that in 1878 Ismail had used the estates as security for various loans to himself and the government,and when the land was sold some 25 years later it was simply the rightful action of the creditors,and the proceeds were not held on behalf of his family. Consequently no restitution was allowed and the claim failed[1].

The second case concerned Sudan.Two entrepreneurs claimed payment in the Mixed Courts from both the Egyptian and Sudanese Governments for work they had done in Port Sudan,alleging that Sudan was anintegral part of Egypt and that therefore the Egyptian government was responsible for Sudan's debts.[2]

The Egyptian Government responded with the clear words

of the Anglo-Egyptian Convention[3] that set out the status of the Sudanese Government as a distinct and separate entity from the Egyptian Government.The court agreed on this point.The Convention was clear in terms that the Sudanese Government was,from 1899 and regardless of any previous status,a separate legal entity,and as the entrepreneurs had contracted with the Sudanese Government they had to look to that authority for payment.

On their part the Sudanese Government disputed the competence of the Mixed Courts on the basis that the 1899 Convention did not permit the exercise in or over Sudan of Mixed Court jurisprudence[4],and this was accepted by the court.It was held that by virtue of the Convention the Mixed Courts had no competence to try matters arising in Sudan,and that this Convention was above all a matter between Egypt and England,and did not need to be approved by the Capitulatory Powers before the Mixed Courts could accept it.In this way the Anglo-Egyptian Convention was judicially recognised,and the court went on to say that even if approval of the Capitulatory Powers was necessary,it was clear that since 1899 the joint rule over Sudan had been accepted de jure and de facto by all the relevant countries,and therefore Sudan was correctly recognised as a separate state.

Sudan's status could have been challenged on the grounds that it had once been a part of Egypt,and thus subject to all the treaties,custom and usage of the country,but the court wisely followed the events of the previous ten years and decided consistently with the accepted political and executive reality of Sudan.By 1910 it had been organised into English-administered provinces,under an English Governor-General who was also Sirdar of the Egyptian army.In the circumstances any other decision would have flown in the face of reason and precedent,and would not have reflected the true facts.

The third case involved an action between an individual and the Greek Treasury[5].Although the latter was a foreign government department the Mixed Courts decided that the same principles would be applied as if it had been a department of the Egyptian Government.Thus it was necessary to classify the acts of the Treasury.They were found to emanate from the Greek Government as a personne civile,and were therefore acts akin to the management of a private business.Consequently the Mixed Courts were competent to decide the case and the Greek Government's plea of sovereign immunity was not accepted.

The court went on to add that the difficulty of enforcing a judgement against a government was not a factor in deciding whether that government was within the jurisdiction of the Mixed Courts or not.The execution of a court's decisions was a separate matter from accepting competence in a dispute,and should not influence that decision,even if enforcement was a brutum fulmen.

The result was entirely in accord with precedent,and reaffirmed the principle that the non-sovereign acts of governments were treated as acts of a private person.The continuation of this reasoning was to be of much greater importance in later years when disputes caused by the Ist. World War began to be heard,and it is significant that the Mixed Courts applied the same principle to the case of the Greek Government as they had to the Egyptian Government in other disputes.As far as the courts were concerned the question of sovereignty could be answered either in the affirmative or the negative,but the same rules applied to the domestic sovereign as to a foreign one.In essence,no difference was accepted between constitutional law and private international law on this point.

The Mixed Courts and taxation.

The requirement for foreigners to pay the taxes levied on all inhabitants of Egypt was becoming more and more accepted,but there were still cases challenging the imposition of these taxes,and one that was viewed as an important test case concerned the large land-holdings of the Vicomte Gabriel de Fontarce in Upper Egypt[6].

In 1910 the Provincial Council of Qena temporarily increased the land taxes in that province by 5%,to pay for a programme of public works,and this decision was later encompassed in a decree of the Egyptian government.The Vicomte de Fontarce refused to pay the increase,and the money was obtained from him by a saisie administrative.He brought an action in the Cairo District Court seeking a declaration that the seizure was against the law[7] and thus invalid.

The Cairo court agreed with him.It viewed the 5% increase as a new tax which,it was held,had to be agreed by the Capitulatory Powers or approved by the General Assembly of the Mixed Courts before it could be imposed. This decision was not unexpected,as there was no definitive view of the obligations of foreigners to pay taxes in Egypt,although most Mixed Court decisions favoured the principle of taxation of foreigners,even if they did not agree with all the taxes suggested. However,the court construed the increase as a new tax, and it was largely on this point that the Egyptian Government appealed.

The Mixed Court of Appeal,after a lengthy summary of the points involved, allowed the appeal and permitted the tax to stand.The reasons were quite straightforward. First,a dispute over whether a tax was valid or not was an issue for the Mixed Courts,and therefore the question had been properly brought.Secondly,the temporary increase of an existing tax already applicable to foreigners was no more than an addition to a tax already approved in one or more of the accepted ways,and thus no new approval was required.Thirdly,no question could

be raised as to the land tax itself because the Ottoman law on which was based the right of foreigners to own land in Egypt allowed such ownership only on the basis of equality with Ottomans.Therefore,so long as all landowners were liable to the same tax a challenge on the grounds of foreign privilege could not be upheld.

This decision not only matched the needs of justice in taxation but was also in line with informed opinion.The absurdity of tax exemption on the basis of foreign nationality was an embarrassment to all honest foreigners and to most Capitulatory Powers.No formal objection was raised to the gradual consolidation of tax on foreigners through the decisions of the Mixed Courts,and the analysis of the relevant laws by the judges showed that there was actually little foundation in law for foreign tax exemption.

The next case,the Heliopolis Affair[8],was arguably the most important single case on fiscal matters to be heard in the Mixed Courts.It concerned the question of property tax on the newly constructed town of Heliopolis,and became well known in Egypt and Europe not only for the large sums of money at stake,but also for the prestige of the advocates involved.In the Mixed Court of Appeal Alexandre Millerand, who was later to become President of France,and Baron Descamps(a Belgian Minister of State),led against the Egyptian Government,and for the government were M.Grandmoulin and M.Pietri,both famous European lawyers.In addition of course there were a number of junior counsel.

Apart from the above factors,the points of law in issue made the case of great interest in the theory of tax,as well as again illustrating the capability of the Mixed Courts to adjudicate on serious and complex matters without favour.

The background to the dispute was simple.On the 23rd.May 1905 Borghos Nubar Pasha(the son of Nubar Pasha)and Baron Empain bought the Oasis of Abbassieh,north-east of Cairo, from the Egyptian Government.Their plan was to build privately an entire new town,and this they very soon

achieved with great skill and endeavour.Two tram lines connected Cairo to the new town of Heliopolis,and it soon became a fashionable and sought after address, colloquially referred to as the Champs-Elysées of Cairo.and administered by the Heliopolis Company.

In 1908 the Egyptian Government demanded payment of a property tax from the Heliopolis Company,but this was refused.In 1909 the government tried another approach,and extended by decree the perimeter of Cairo so that it included Heliopolis[9].The Company was then asked for the property tax payable on all Cairo buildings,but it again refused to pay,and issued a writ on the 21st.August 1909,for a declaration by the Mixed Courts that no tax was due.

In 1912 the Cairo District Court found for the Company and declared that it was not liable for property tax. The Egyptian Government at once appealed,and in the arguments of counsel and the judgement of the Mixed Court of Appeal the issues were fully developed and answered.

M.Millerand for the Company made four basic points. First,he claimed that the decree[10] allowing property tax on foreigners was only for the large towns,and then only those existing in 1884.Secondly,though linked with the first,the tax on Heliopolis was only valid if agreed with the Capitulatory Powers.Thirdly, he alleged that because the contract of sale did not expressly reserve the Egyptian Government's right to charge taxes,such right was lost,especially because other sales of land by the government often had an express clause relating to tax.Finally,Millerand claimed that tax was basically a payment in return for services,and as all services in Heliopolis were provided by the Heliopolis Company the government had no right to levy a tax for which no benefit was given.

Baron Descamps employed broadly similar reasoning.He suggested that the contract of sale should be interpreted

in favour of the party with the responsibility of developing the site,that is the Company,because the contractual terms were not clear as to taxation.He also claimed that it was unfair in equity to tax the Company because there was no consideration and,further,that there was no agreement with the Capitulatory Powers to allow taxation of Heliopolis, unlike the agreement for Cairo[11].

In reply,Mm.Pietri and Grandmoulin relied on three main points.First,they argued,why must a property tax be for something specific?The duty to pay a tax was owed by juristic persons because of the authority of the law,and the obligation to pay tax was independent of any guarantee of services in return.As,they claimed,this was a generally accepted view in Europe they suggested that it was no less the case in Egypt.

The second point relied on an interpretation of Article 5 of the contract of sale.By that provision it was confirmed that the Heliopolis Company was subject to all laws in force in Egypt.It was thus irrelevant that there was no mention of tax in the contract,and the absence of any mention could not be taken as renouncing the Government's right to levy tax.Thirdly,the Egyptian Government had sold the land in its private capacity,and thus no exercise of sovereign authority in fiscal matters could be ascribed to a private land sale.

All these points were closely considered,not only by the parties but also by the rest of Egypt and much of Europe. The two threads of reasoning were the private and sovereign nature of the dispute.As a matter of contract what,if anything,had been decided by the parties?As a question of public sovereignty had the Egyptian Government renounced its right to levy tax?Could it do so as a private person for its public authority?

After a carefully argued case the Mixed Court of Appeal decided in favour of the Government and declared six basic points.First,the theory of mixed interest gave the Mixed Courts competence over the Heliopolis Company,although it was Egyptian,because there were mixed interests.Then

the only right in this instance that the Capitulatory Powers had was to protest against the inequality of the tax,if they perceived one,but not to interfere with the boundary details of Egyptian cities.Further, taxes were a general charge and not related to the provision of services,and nothing in the contract of sale could be taken as a renunciation of the Egyptian Government's rights to levy taxes.Finally,the court observed that the Heliopolis Company had,by its own agreements with the inhabitants of Heliopolis,every right to pass on any taxes levied on it,and so the people who lived there and not the Company would actually have to pay the tax in the end.

In deciding as it did,the Mixed Court of Appeal dealt with the arguments raised by the distinguished counsel for the Company,but were clearly not sufficiently swayed by their arguments or status to uphold the Cairo District Court judgement.

A further factor that must have influenced the final decision was that the boundaries of Alexandria had been extended without protest,in 1897,to include the new district of Ramleh,and the perimeter of Cairo itself had also been extended to include Zeitoun and Matarieh[12]. Thus the inclusion of Heliopolis within Cairo was not a completely arbitrary and original act.

It is worth noting that the judgement also stated that the percentage of the tax could not be increased without the consent of the Capitulatory Powers,or approval by the General Assembly of the Mixed Courts.This probably meant that no permanent increase would be allowed without agreement,but if the prohibition was meant to apply equally to temporary increases then the earlier decision in the de Fontarce case must be reconsidered.

In any event,the decision was received with relief by the Egyptian Government,and the Mixed Courts' reputation was increased not only by the skilful judgement, but also by the very fact of having carefully and with

great learning rejected the arguments of the famed advocates Millerand and Descamps.In setting out the general theory of tax as it did,the Mixed Court of Appeal also established finally that foreigners were not generally able to avoid tax by resorting to claims in the Mixed Courts,and while the judgement did not prevent further attempts at non-payment of taxes,no major new tax problems later arose.

The Mixed Courts and Company Law.

By 1906 the increasing prosperity of Egypt was paralleled by an increase in the number of limited companies in operation[13].This was not without its drawbacks,and fears of speculation in worthless shares and a financial 'bubble' were encouraged by a recession in 1907 when the foreign owned Bank Sconto e di Rispormio went into liquidation,causing great concern for the value of commercial assets on which financial credit was based.

There were also difficulties linked with the activities of groups of promoters who would set up ostensibly valuable companies and sell shares to a public keen to benefit directly from Egypt's obvious prosperity.All too often however the shares were actually valueless, and hundreds of people lost their money.To prevent,or at least limit,fraud in the promotion of companies the Egyptian Government had begun a series of measures in 1899[14]regulating the incorporation of Egyptian companies.

These measures basically prevented unpaid shares being used to establish limited liability companies,and forbad the transfer of unpaid bearer securities.All memoranda and articles of association had to be officially published,and no new shares were to be offered at a discount.There were also special rules against founder shares,which were a device to attribute the over-value of a company to certain shares which were then sold by the promoters,leaving a worthless remnant of ordinary shares.All these regulations worked well for Egyptian companies and,by maintaining the procedure whereby a firman of authorisation from the Khedive had to be granted to incorporate a new limited company,the Egyptian Government ensured that few,if any,undesirable promoters formed Egyptian companies.

Unfortunately,there was nothing to prevent unscrupulous promoters from setting up companies outside Egypt, and continuing their nefarious activities inside the country with foreign registered companies.

It was in this context that the City and Agricultural Lands case was decided[15].The plaintiffs had invested money in this English company and,because of the 1907 recession,wanted to recover it.In pursuit of this aim they sought a declaration in the Mixed Courts that the company was in fact an Egyptian one,and therefore invalidly formed because it had no firman of authorisation,as required under the Mixed Civil Code.This claim was rejected by the Alexandria Commercial Court, but on appeal it was held that the allegation was well-founded.The court looked behind the registration in England,thus piercing the veil of incorporation,and stated that the correct approach was to have regard to the centre d'exploitation,that is the sphere of activity,and the siège social,or the head office.The company was formed to exploit land in Cairo,and was managed in Egypt.The only employee it had in the United Kingdom was a part-time secretary whose sole responsibility was to deposit an annual statement of accounts in accordance with English company law.

The Mixed Court of Appeal therefore declared that the company was in reality an Egyptian one,had not been duly authorised,was consequently null and void,and its liquidation was ordered.In doing so it is clear that the court regarded the question of company status as one of contract,and not as personal status or,if it was one of personal status,then the question to be determined was in fact one of nationality,and therefore within the competence of the Mixed Courts.If the question was solely a personal status one the correct court was the consular court.By Egyptian law however it was argued that the Mixed Courts were competent not only because it was a contractual dispute,but also by analogy with native companies where the Native Courts,and not the personal status Sharia Courts,were the correct forum.

The effect of this decision was to extend all Egyptian

company regulations to foreign companies whose residence, that is to say principal place of business,was in Egypt, regardless of nationality or incorporation.In closing the loophole of foreign registration the Mixed Courts also firmly established the principle,already applied in other fields,that the substance of a company and not its form was the important factor.The judgement was clear,no truly Egyptian company could be registered abroad to evade Egyptian company law.

This approach led to a conflict with the British Consular Court,in the Helwan Development case[16]. Following the City and Agricultural Lands decision the Helwan Development Company Ltd.,an English company registered under the Companies Acts 1862 to 1900,decided to go into voluntary liquidation and two liquidators,one English and one foreign,were appointed.

An Egyptian shareholder sued the company in the Mixed Courts,asking for it to be declared null and void, because it was illegal by virtue of non-compliance with Egyptian law.This declaration was granted,and three other liquidators appointed.They tried to get the books and assets from the voluntary liquidator,but a British shareholder applied to the British Consular judge for an injunction to restrain the English liquidator from parting with them.This was granted by Cator J,who held that the question was one of personal status according to the codes[17] and thus for the British Consular judge to decide.

Thus there were two conflicting judgements concerning the same matter.In the end,diplomatic pressure from London ensured that the Mixed Courts went ahead with the liquidation,and the principle of regulating foreign companies by applying the test of principal place of business,as represented by sphere of activity and head-quarters was upheld.

A preview to this theory had been seen in 1907,when the

Mixed Court of Appeal held that three types of association were recognised by its codes: the partnership, the limited partnership, and the limited company. The court said that foreign companies formed in Egypt had to be assimilated to one of the three types, and thus comply with regulations as to publicity[18], but it was to be the City and Agricultural Lands, and the Helwan Development Company cases that finally settled the matter.

It was later decided that shares in a company annulled by the court could not be validly sold, as the company had ceased to exist[19], and later still the Mixed Courts decided that they were competent to investigate a mutual association of employees to ascertain whether it was a proper juristic personality or not[20].

The final company case involved an English company that was declared to be validly and correctly incorporated in England[21]. Rodocanachi, Reynolds and Company Ltd. was set up to buy cotton in Egypt for sale in Liverpool, with payment being made in London. Despite a contrary opinion by Emile Vercamer, a leading Egyptian jurist and ex-judge of the Mixed Court of Appeal, who had left the bench to be a consultant lawyer, the court held that the English company was in fact English and not Egyptian, and thus did not have to comply with local regulations. In any event, the court stated that it was perfectly clear that the company was one with limited liability, and no misleading description had been used. Here again the true nationality of a company was based on its principal place of business and not its incorporation or domicile, and the decision does show that the Mixed Courts were quite open to decide in favour of a foreign company if the facts were suitable.

The British Protectorate and the Ist.World War.

Although the declaration of a British Protectorate over Egypt did not have a direct effect on the Mixed Courts,the changes that it and the Ist.World War brought about did lead to new problem areas for the courts to deal with.

When Turkey joined the war against the Allies the immediate result was a Proclamation of the 2nd.November 1914,by the GOC British Troops Egypt,announcing that he had 'been directed to assume military control of Egypt'. This antailed the application of martial law,though as a supplement to the civil administration and not superceding it,and empowered the General in command to issue proclamations with the force of law.

The next stage was the circulation of a note,on the 24th.November,from the British Agent and Consul-General to all foreign diplomats in Cairo,requesting all communications with Egypt to be made through him.This was soon followed,on December 18th.,by the unilateral declaration of a British Protectorate [22] placing Egypt under de jure British control,in addition to the de facto control that had been exercised since the 1882 Occupation.The protectorate,or Himaya,did not affect the existence of the Capitulations or other accepted international agreements,despite Turkey's removal as the sovereign power,and despite her unilateral abolition of the Capitulations in Turkey,because these had become part of custom and usage in Egypt and therefore continued.There was no treaty regulating the Protectorate,but matters continued very much as before, except that British control was allowed to become more evident.

It must be stressed that martial law and the Protectorate were quite separate,although both emanated from Turkey's alliance in the war.The Protectorate was a political move,whereas martial law was essentially a military measure which was administratively convenient in that new laws could be promulgated without the

consent of the Capitulatory Powers.Thus,measures such as the banning of adulterated drink,or the collection of the Ghaffir tax,were made subject to military law to enforce them.

On December 19th.1914 Abbas Hilmi was deposed by Britain as Khedive,because of his pro-Turkish views,and the Khediviate,renamed the Sultanate,was offered to his uncle Prince Hussein Kamel,a son of Ismail[23].Thus British control of Egypt was consolidated,but with what effect on the Mixed Courts?

First,the promulgation of desirable laws by military proclamation eased pressure on the Mixed Courts to deal with offences through the Tribunal des Contraventions .For instance,the sale of adulterated alcohol by foreigners was an offence under Police Regulations leading to a fine of 1LE,or 7 days in prison,and confiscation of the drink.Under martial law the sale of such drink,by foreigners or natives,was made a military offence with a fine of 100 LE and six months in prison. Military law in fact showed no distinction between foreigners or natives and,although it isbeyond the scope of this present study,Lt.Gen.Sir John Maxwell,as GOC Egypt,was responsible for instituting many worthwhile but overdue penal measures that had been held up previously for lack of agreement between the Capitulatory Powers.

The Mixed Courts became directly involved in the civil processes forced ahead by the war.The Egyptian Government wanted a moratorium on debts,but the General Assembly of the Mixed Courts could not be summoned to agree these provisions because of the summer vacation. Hansson,the acting President of the Mixed Court of Appeal,was asked to consult with his available colleagues and indicate whether the law would be acceptable or not.They agreed it would,and commercial debts were suspended on the 9th.August 1914.The same semi-formal procedure was used to agree a law on foodstuff pricing,

which was approved by the available Mixed Court judges on the 16th.August,and made law on the 20th.These and similar ad hoc procedures were later approved by the full General Assembly on 6th.November 1914.In this way the Mixed Courts gave an official seal of approval to new measures,although strictly the full General Assembly should have been consulted.The adoption of this procedure showed flexibility on the part of the Mixed Courts,and an understanding of the gravity of the situation.(See later,Structural Development).

The only other direct measure affecting the courts was a reduction in the number of judges forming a quorum.Three,instead of five,were able to sit in the District Courts,and five,instead of nine,in the Mixed Court of Appeal[24].This allowed for a reduction in numbers due to the absence of German and Austrian judges from Egypt,and other dislocation due to the war, and meant that the work of the courts was not otherwise affected.

Finally,did the Protectorate affect the Mixed Courts or the cases before the judges?Certainly no change in the power or status of the courts arose from the declaration of a Protectorate,and the only result was to provide a new reason for litigation,by parties who had been Ottoman subjects claiming that the Protectorate changed this status.It is worth considering the argument here,although no fundamental change in approach was accepted.In essence,the dispute was whether the subjects of a protected state took on the nationality or status of subjects of the protector.The answer was no.The inhabitants of a protected state did not assume the character of the protecting state,although this question turned on the exact status of the protection.Was it 'of' or 'over' the country?In any event, Egyptians continued to be treated as local subjects and not British,and thus the Mixed Courts carried on,unaffected directly by the Protectorate[25].The questions that did arise in relation to other changes in status are dealt with in the next section.

The Mixed Courts and Foreigners.

The years 1906 to 1915 saw several important actions concerning the competence of the Mixed Courts in relation to persons whose nationality was not clearly determined. The first raised an interesting point on the new anti-clerical laws of France which also had the effect of fundamentally separating Church and State. A certain Syrian born in Beirut was under French protection, but the opposing party alleged that this French protection was in fact only of a religious nature, and therefore as the French Government and the French Catholic Church were no longer linked, the protection of religious establishments and any consequent protection of individuals was that of a church and not a country. The Mixed Court at Mansourah[26] did not accept this point. It was held that foreign protection would be recognised as truly foreign unless a treaty changed the position, and the somewhat ingenious argument above failed.

In 1912 the position of Swiss nationals was confirmed [27]. They were entitled to be registered at the French, German or Italian consulates, and were treated as natives of the registering countries for judicial purposes. Thus a Swiss registered at the French consulate would sue a Swiss not so registered in the Mixed Courts. If two Swiss were both registered at the same consulate then the consular court would have jurisdiction, except of course for real property matters. This decision clarified the position of Switzerland, which was not a Capitulatory Power and had no separate consular representation in Egypt.

The court went on to declare that it was not necessary for Switzerland to have adhered to the Reform, a principle so old and well established that it was beyond doubt[28].

International political events caused the next case[29]. Greece had occupied the island of Chio, previously under Ottoman control, and the question was whether the inhabitants of Chio were Ottoman or Greek. It was held

that the Greeks had only occupied the island de facto and not de jure,and until Egypt recognised the occupation as lawful the islanders would remain Ottoman.Even if they could be Greek the court went on,they would have to opt expressly for a change in nationality before their Ottoman status was lost.A similar approach was made to all such issues which,in the fast changing circumstances of the time,were all too frequent.There was,for instance, the problem of Cyprus.The island had been occupied by Britain in 1878 but with Turkish sovereignty,and in 1914 Britain took full control.Were Cypriots Ottoman or British?

A similar problem arose over the Dodecanese.Italy had occupied the islands.Did this mean the inhabitants were Italian?These problems were not really settled till the 1920s,but the case of Chio provided a starting point for future analysis.

It was often the case that no foreign nationality could be proven.If that happened the Mixed Courts could and would presume an Egyptian nationality[30].It is also noteworthy that despite earlier decisions on national status parties still disputed nationality in the courts.For instance, Bulgarians were again declared to be foreigners in 1915[31] and this constant challenge to established principles is an indication of how optimistically litigious many of Egypt's inhabitants were.

General Jurisprudence.

The work of the Mixed Courts continued to involve all sections of Egyptian society,and to develop fields already entered,as well as exploiting new ones.One such area was that of worker compensation for accidents. A series of cases established that an employer was responsible for his workers' safety,and so should exercise reasonable care to ensure as safe a system of work as possible[32].This can be viewed as restricted to industrial and agricultural workers and not domestic or office staff,but the decisions led to a greater awareness of the safety rights of workmen,and the responsibility of employers,and eventually served as the base for safety at work legislation in Egypt.

In one case[33]it was held that an employer's chief mechanic had the responsibility of warning workers of the dangers of belt-driven machines so as to provide a safe working environment.If he did not do so the employer was liable despite the absence of any relevant provision in the codes.This can be seen as a further application of the principles of natural law and equity, and provides another example of a basic idea being developed solely by the jurisprudence of the Mixed Courts.

The Mixed Courts however took a restrictive view of a carrier's responsibility to its passengers.Tramdrivers, known as Wattmen,were regarded as notoriously careless and were sent to operate trams with only two or three days training.Accidents were quite common,but the Mixed Court of Appeal held that tramdrivers owed a low duty of care to passengers and refused to uphold claims against their employers for the negligence of the employees.[34]

Jurisprudence continued to develop positively in the protection of artistic property.It was held that the reproduction of a professional photographer's photo-

graphs without his permission was against natural law and equity and therefore actionable[35].It was also decided that the protection offered by the Mixed Courts would be as wide as the protection available in the plaintiff's country,if he was a foreigner,and thus the judges sought further inspiration from the laws of those foreign countries that regulated intellectual and artistic property[36].

One case also made it clear that art would be protected whether it was good or not[37],and so questions of merit were not factors to be considered.

It cannot be said though that Art.11 and its corresponding application were a universally available formula.In 1913 the Mixed Court of Appeal took the opportunity to reiterate[38]that the rules of natural law could only be used when made necessary by the absence of any provision in the codes.This strict interpretation was declared to be a jurisprudence constante,but can be viewed with a later case[39]which confirmed that if there was no relevant provision in the Mixed Codes the court could look straightaway at natural law and equity and did not have to follow what was in the Code Napoleon or any other foreign law.

The courts had further cases to consider on the sale of crops that had not yet sprouted.It was again held that, despite Art.330 of the Mixed Civil Code,the sale of such a crop at the market price on delivery was valid[40], and all such cases should be decided with reference to the Moslem law inspiring the provision[41].Further,the Mixed Courts declared that Art.330 could not be used to hold void contracts that were based on customary usage such as the needs of cotton growers,when cultivators had to sell their cotton before it had grown,or often before it had been sown,to raise cash for the coming year[42].

Thus the Article was interpreted in a way that accorded with commercial and agricultural practice,and which

worked in favour of assisting the grower in the customary way.

It is interesting to note when discussing the sale of these future crops that it was held that the sale of all a future crop was the sale of specific goods,and it was not necessary to ascertain the goods by appropriation[43].

Maritime trade was of continuing concern in the courts, but only two cases arise worth discussion.So much of maritime commerce was accepted and unambiguous that the courts,if called upon to adjudicate,simply decided without much argument or dissent.

In 1906,it was held that a surcharge of 4 PT per ton per day for delays in the port of Alexandria was quite usual and acceptable,being stipulated in most charter-parties agreed in Alexandria[44],and thus it had become a generally accepted figure.In 1910 the Mixed Court of Appeal held that where a question of salvage or maritime assistance arose it was necessary to look at the 1905 Brussels Convention,where 21 countries were represented to see what was accepted as the consensus of maritime nations[45].This was a continuation of the judicial desire to maintain an up to date and universal approach to maritime matters,comprising as they did of trade between different nationalities and often on foreign ships.

In the field of damages the Mixed Courts became aware of the possible inclusion of interest as part of a compensatory sum stipulated to be payable under a contract.Interest was restricted by the codes to 5% for civil matters and 7% for commerce[46],unless otherwise agreed when the limit was 9%[47],and it was held that if one sum of money was contractuallyagreed to be paid as damages and interest,it was up to the creditor to show that the rate of interest calculated within the whole was legally justified[48].

The beginning of a theory on hire purchase contracts and conditional sales was in evidence at this time.Increasing prosperity had led to increased ambitions for the purchase of all types of goods,and the general notion of hire purchase was quickly accepted and used.The first case setting out broad principles on this issue,again in the absence of any relevant provision in the codes,was in 1913[49].The court declared that it was perfectly permissible to sell an object by means of rental payments so that only when all payments had been made would property pass from the owner/creditor to the debtor/hirer.The contract of sale was viewed as suspended until all the payments had been made.

It was also held that a clause allowing recovery of the goods on non-payment of any rental due was valid.It was from these beginnings that the potentially huge field of conditional sale agreements and other hire purchase deals was regulated by the courts,and the above principles were the base of all such future contracts.

Judges continued to make pronouncements on fraud.It was not, for instance,accepted that mere silence could be fraudulent unless it was in some way a positive silence and therefore operative on the victim[50],and nor was a mere false statement fraudulent if it could be checked easily.It had to be something capable of deceiving an ordinary intelligent person[51]. To prove fraud it was generally necessary to have witnesses although presumptions could be used,but vague allegations without proof or some circumstantial evidence were not received by the courts[52].

The allegation of moral violence continued to produce interesting cases.It was decided in 1909 that excessive payments to a mistress could be reduced when the cohabitation ended,on the grounds that to continue the payments that had been agreed earlier,in these new circumstances,was due to moral violence to which the courts would not be a party[53]. It was also again decided that a father was not able to claim that moral violence was directed against him when forced to

guarantee his son's debts to save the family honour[54]. Nor was the threat of enforcing a legal right objectionable, even if the other party was in fear of the right being enforced[55]. These cases illustrate the robust attitude of the Mixed Courts to alleged moral violence. If it was felt that the allegation was made just to evade a straightforward debt, or in circumstances where the party alleging moral violence in fact had a moral duty to pay, the courts were not prepared to allow the principle to be used as an escape clause. This approach did not lessen their vigilance in protecting innocent parties from contracts that had not been freely agreed, and the balance was a fine one, leaving much to the discretion of the judges.

Mistake was another reason to annul a contract, and three cases show the broad reasoning accepted. In one, a factor sold a pearl at an undervalue because he mistook his principal's instructions. On a move to have the contract set aside for mistake it was held that a factor is treated as the owner of the goods by Art. 86 of the Mixed Commercial Code, and thus the contract was completely valid[56]. If however the seller had been a simple agent of the owner, he would have exceeded his authority and the court observed that it would have considered setting aside the contract.

In 1908 it was held that the sale of a machine with a stated horsepower that was found to be wrong was void for mistake[57], and in 1914 a sale of goods by sample, where the bulk did not correspond with the sample, was declared to be an error and essential mistake, nullifying the purchaser's consent[58].

It can be seen that the Mixed Courts used the concept of mistake to remedy the absence of any clear articles relating to merchantability and fitness for purpose, and thus provided solutions to a variety of sale of goods problems not covered by the codes.

Personal status disputes still found their way into the Mixed Courts,even though there were personal status courts.One such issue concerned legal capacity, and even though legal incapacity was treated as a personal status matter and thus for the personal status courts[59]it was nevertheless held that if the incapacity of a foreigner was due to insolvency or the appointment of a judicial adviser then it was a question for the Mixed Courts and not the consular courts[60].

Although this approach was arguably correct and did not cause any conflicts,a later judgement went further and said that the Mixed Courts were capable of recognising the obvious nullity of a marriage without sending the particular point to the relevant personal status court for an opinion.Thus by Art.122 of the Native Personal Status Code a moslem woman could not marry a non-moslem man,and it was held that this was so obvious that no reference to the Sharia Court was necessary[61].This reasoning had the effect of streamlining cases where a personal status element arose and the Mixed judges felt that they knew the answer,but it was an unsatisfactory approach.These personal status decisions rarely helped a sound and useful jurisprudence to develop because of the conflict of personal status jurisdictions,and no great enhancement of the Mixed Courts' reputation followed the purely personal legal wrangles between parties of whom one at least would always disagree and refuse to accept whatever decision had been reached.

Nevertheless the encroachment occurred and can be seen as useful in so far as the Mixed Courts drew on the decisions and laws of the personal status judges and incorporated them into their jurisprudence.

Finally,there were two cases of policy.In one a clause purporting to oust the jurisdiction of the Egyptian courts was held to be void,even though the contract containing the clause had been signed abroad,because

it was to take effect in Egypt[62].

In the other,the fact that free legal aid was available to poor clients was taken to mean that no charges could be made by anyone,advocate or not,in circumstances where an advocate would not be paid[63].The overriding principle,said the court,was that no advantage could be taken of the poor,and so the privilege of free legal aid was upheld in a manner much wider than a strict application of the codes would have produced.

The Structural Development of the Mixed Courts.

Although there were many small changes in theMixed Courts' procedure and laws,only three stand out as important from the jurisprudential point of view between 1906 and 1915.

The first was comparatively minor.As a result of cases before the Mixed Courts where many judgements severely criticised gambling in stocks and shares,Law no.24 of 1909 was passed,amending Art.77 of the Mixed Commercial Commercial Code and regulating the working of stock and produce exchanges.The Government and the Mixed Court of Appeal had to approve the rules of all such exchanges and so long as this was done any operations in compliance with the rules was valid.This new law cleared up the problem of conflicting cases on speculation and gambling,and was based on the consensus of relevant jurisprudence.

The next,more important,change in the law was Law no.17 of 1911,amending Art.12 of the Mixed Civil Code,and providing for the approval by the General Assembly of the Mixed Court of Appeal of all new laws affecting foreigners.This may be contrasted with the previous situation where new police regulations were able to be approved by the Mixed Courts.The consequence was important.Egypt had the right to legislate for all foreigners with the approval of the General Assembly acting as a legislative authority.The need to consult all the Capitulatory Powers in turn,and the other difficulties involved in passing laws for foreigners, were at once cleared away,and the rights of the Capitulatory Powers were entrusted to the Mixed Courts, with the proviso that any such Power could,within three months of approval of a law,ask the General Assembly to reconsider the proposal[64].

While it is possible to interpret the new Art.12 as not applying to changes in taxation,nor to the Judicial

Regulations,the new provision clearly allowed Egypt full scope for legislation,and made even greater use of the skills of the Mixed Court judges.

In 1912 four new laws were considered;an amendment to Art.54 of the Mixed Civil Code concerning easements for water became Law no.27;a reform of the rights of mortgagees(Art.692)became Law no.24;an amendment to Art.792 of the Mixed Civil Procedure Code regulating arbitration clauses in public works contracts became Law no.25;and the Five Feddan law,making five feddans of land,the dwelling house,two draft animals and tools of the trade of a debtor free of seizure for non-payment of a loan,became Law no.31.

This procedure continued to work,and led to many reforms proposed either by the Mixed Court of Appeal itself or the Minister of Justice.The Five Feddan law especially redressed the balance of debt proceedings in favour of the small cultivator,who had suffered greatly as a result of the 1907 recession and consequent foreclosures by many mortgagees.

This last law was also the result of the third change. A number of conflicting decisions by separate chambers of the Mixed Court of Appeal had led to difficulties in interpreting and applying the law.Fundamental conflicts were rare but it was often difficult to reconcile separate judgements,andsome form of superior hearing was needed.Consequently,Law no.24 of 1906 introduced Art.416bis into the Mixed Civil Procedure Code,so that any chamber of the Mixed Court of Appeal could refer a point of law to the whole court in plenary session,if it felt that because of previous conflicting decisions there was a need for a definitive answer to the questions raised.

This plenary decision fixed the question of law till it was considered again in plenary session,and so made it effectively binding on the entire Mixed Court system.

The drawback to the use of the plenary session was simply that few judges were prepared to refer points because the convocation of this extraordinary meeting meant that all Court of Appeal business was delayed till the question had been answered.

Although the procedure was thus cumbersome it allowed the clarification of conflicting decisions and assisted in the efficient working of the Mixed Courts.It was at one of these plenary sessions[65] that the judges' opinions formed the basis of the Five Feddan law which was then submitted to the General Assembly(almost exactly the same judges)for consideration as a law.

Other conflicts dealt with included a decision that local usage was to be respected when assessing the ownership by two natives of conjugal furniture[66],and an interpretation of the right to appeal a summons concerning real property[67].

All in all the use of the plenary session in settling conflicts,and the General Assembly in approving new legislation,led to a more orderly progression in the law, and allowed many more of the Mixed Courts' decisions to be enacted in statutory form.The courts continued their policy of moving in response to the judicial and legal needs they perceived,and despite growing Egyptian nationalism it is clear that no cause for disquiet could be found in the Mixed Courts.They were still Egyptian courts applying Egyptian law,now in the name of the Sultan since the deposition of Abbas Hilmi and the creation of the Egyptian Sultanate. Their jurisprudence matched the just aspirations of their litigants,and played a vital part in the formation of a strong feeling for the rule of law and equity.

Egyptian Nationalism and the Mixed Courts.

A movement began in the first decade of the 20th.Century in Egypt to campaign against the inequalities of the legal system.Although much of the movement was bound up with nationalist views the consensus of the Egyptian National Congress in Brussels[68] was that the Mixed Courts were 'la plus grande garantie de la justice en Egypte'.The main reason was that the Egyptian Government had no right to intervene in their work,and the independence of the Mixed Courts from English influence was also applauded.Far from being seen as an unwarranted imposition on Egypt,most nationalists appeared to regard the Mixed Courts as the only forum capable of redressing inequality,especially by taking on the trial of crimes by foreigners,despite the fact that most of the judges were foreigners.

In fact,the Egyptian Government and the English Advisers had wanted an extension of criminal jurisdiction for some time,but it is interesting to note that the nationalists felt no particular animosity against the Mixed Courts or their personnel,although some views were to change later.

The plans for extension of the Mixed Courts in criminal matters later became part of the general reform movement which culminated in the 1937 Montreux Convention,dealt with in Chapter 7.Despite the gradual desire for reform, the Mixed Courts escaped the virulent nationalist propaganda directed at other Egyptian institutions and at the Egyptian sovereign himself.Perhaps one important reason was the attitude of the judges of the Mixed Courts.In 1911 the Cairo District Court said:'...si l'étranger vit sous le droit d'exterritorialité en tant qu'il n'est pas soumis à la juridiction du pays,néanmoins le sol où il se trouve restera toujours le sol de l'Egypte,pour lequel est valable la législation du pays,en tant que les dispositions des Capitulations ne crèent pas une exception'.[69].

Notes to Chapter 6.

1.Cairo District Court 2.6.1909.
2.Bencini & Quistas v Egyptian Government & Government of Sudan,Cairo District Court 11.4.1910 Pres.Herzbruck.
3.19.1.1899.
4.Art.8,Convention.See discussion on Dongola,Chapter 5 p.133.
5.Kildani ve.Haggar v Fisc Hellenique,MCA 9.5.1912 BLJ XXIV p.330.
6.MCA 2.3.1912 Pres.Larcher,from Cairo District Court 9.5.1911 Pres.Kraft.
7.Especially the Decree of 3.5.1883 and the Ottoman law of 7 Saffar 1284,both concerning property and tax.
8.MCA 30.4.1913 Pres.Gescher BLJ XXV p.338,from Cairo District Court 21.5.1912 Pres.Kraft.
9.Law no.12,of 15.6.1909.
10.13.3.1884.
11.Agreement of 1909 between Egypt and the Capitulatory Powers not to object to the Cairo property tax.
12.Decree of 5.4.1897.
13.Foreign companies tended to be large.In 1906 45 had a paid up share capital of over ½M LE each,and many more were almost this size.There was 46M LE of French capital in 1914,mostly invested in large companies such as Credit Foncier and the Egyptian Sugar Company.British capital totalled 30M LE in a broad range of trading,manufacturing and investment companies.Belgian capital amounted to 14M LE,mostly in land,transport and industry.In 1906 the average dividend of limited companies was 9½%,with 12 companies paying over 12%.These were exceptionally good returns for the time.See Tignor,Modernisation and British Colonial Rule in Egypt,1966,Princeton Univ.Press,p.358. Foreign capital had increased from 26.2M LE in 1902 to 100.152M LE in 1914.
14.Decree of 17.4.1899,and amended by Decree of 3.6.1906; Art.46 MCC and regulations made thereunder.
15.Consorts Zogheb v City & Agricultural Lands of Egypt Ltd., MCA 29.4.1908,from Alex.Commercial Court 6.1.1908.This case caused diplomatic repercussions discussed in Gorst to Grey no.36,22.5.1908 FO 368/181.

16.Helwan Development Co.Ltd.,In re,Cairo District Court 29.5.1909.
17.Art.4 MCC,Art.9 ROJ.
18.MCA 12.6.1907 BLJ XIX p.304-307;Art.54,58 M.Com.C.
19.MCA 17.11.1910 Pres.Korizmics followed,upholding Cairo District Court 13.2.1910;company annulled by judgement 9.3.1909.It is difficult to understand what other decision could have resulted.
20.Alex.District Court 9.9.1913 BO XV no.13,on appeal from Summary Tribunal.
21.MCA 25.1.1913.
22.The Protectorate was declared in the following terms:
'His Brittanic Majesty's Secretary of State for Foreign Affairs gives notice that,in view of the state of war arising out of the action of Turkey,Egypt is placed under the protection of His Majesty and will henceforth constitute a British Protectorate.The suzereinty of Turkey over Egypt is thus terminated,and His Majesty's Government will adopt all measures necessary for the defence of Egypt,and protect its inhabitants and interests'.
23.The Khedive was deposed in the following terms:
'His Brittanic Majesty's Secretary of State for Foreign Affairs gives notice that in view of the action of His Highness Abbas Hilmi Pasha,lately Khedive of Egypt,who has adhered to the King's enemies,His Majesty's Government have seen fit to depose hin from the Khediviate,and that high dignity has been offered,with the title of Sultan of Egypt, to His Highness Prince Hussein Kamel Pasha,eldest living Prince of the family of Mohamed Ali,and has been accepted by him'.
24.Law no.3 1915.
25.See The Ionian Ships (1857) Spinks' Cases p.193,and R v Crewe,Earl of,ex parte Sehgone 1910 2 KB 576,for a useful general discussion on protection.
26.De Carmela Soussa & others v Admin.General des Wakfs, Summary Tribunal Mansourah 10.5.1911 Pres.de Herreros GTM I p.119.
27.Bernhard v Banque Cantonale de Thurgovie,Summary Tribunal Cairo 6.4.1912 Pres.Halton GTM II p.160.
28.Referring to MCA 1.3.1877.
29.Fafalios v Lambos,Alex.District Court 27.2.1915 GTM

V p.73,on appeal.
30.MCA 15.4.1914 BLJ XXVI p.331.
31.MCA 16.6.1915 BLJ XXVII p.409;Tunisians had also been confirmed as foreigners in 1904-MCA 10.3.1904 BLJ XVI p.158.
32.MCA 18.4.1906,and also 8.3.1905;28.12.1904;2.12.1903.
33.MCA 11.11.1907.
34.MCA 1912,exact date unknown.
35.MCA 1.3.1905 BLJ XVII p.140;MCA 16.5.1906.
36.Ibid,and also 16.3.1906 BLJ XVIII p.266.
37.MCA 26.3.1910 BLJ XXII p.338.
38.MCA 13.2.1913 BLJ XXV p.178.
39.MCA 3.4.1914 BLJ XXVI p.335.
40.MCA 8.5.1912 BLJ XXIV p.323;MCA 13.6.1912 BLJ XXIV p.407.
41.Hanafite doctrine contained in Art.383 of the Moslem Code of Real Status by Kadri,and Art.330 MCC;MCA 13.12.1913 GTM IV p.45.See Chapter 2 note 19;Chapter 5 note 49.
42.MCA 18.2.1914 BLJ XXVI p.230.This is an apparent contradiction.
43.MCA 18.2.1914 BLJ XXVI p.230.
44.MCA 30.5.1906 BLJ XVIII p.303.
45.MCA 16.3.1910 BLJ XXII p.198.
46.Art.183,Art.184 MCC as amended by Decree 10.7.1892.
47.Art.185 MCC;Decree 10.7.1892.
48.Cairo District Court 27.12.1913 GTM IV p.65.
49.Singer Manufacturing Co. v Abdel Razak Cato,Alex.Commercial Court 15.12.1913 Pres.Pereira e Cunha GTM IV p.41.
50.MCA 30.3.1915 BLJ XXVII p.250.
51.MCA 8.12.1915 BLJ XXVIII p.48.
52.MCA 29.5.1913 BLJ XXV p.417;MCA 15.4.1909 BLJ XXI p.383, following MCA 13.1.1904 BLJ XVI p.101.
53.MCA 13.6.1909 BO XI no.3.
54.MCA 3.6.1911 BLJ XXIII p.351,following MCA 16.12.1896 BLJ IX p.58;see Chapter 5 note 43.
55.MCA 13.5.1914 BLJ XXVI p.388.Fear was usually for the family reputation.
56.MCA 11.1.1906 BLJ XVII p.72,following MCA 2.12.1903 BLJ XVI p.15.
57.MCA 27.5.1908 BLJ XX p.257.
58.MCA 13.5.1914 GTM IV no.448.
59.Art.190 MCC:La capacité relative ou absolue est réglée

par la loi de la nationalité à laquelle appartient la personne qui contracte.

60.MCA 6.1.1908 BLJ XX p.49.

61.Moharrem v Saloman Sasson,MCA 11.6.1913 Pres.Gescher GTM III p.196.The court also recognised the fatwa of the Grand Mufti of Egypt given on 9 Gamad Awal 1329.

62.Usiel v Librarie Commerciale,Cairo Commercial Court 20.4. 1912 Pres.Nyholm GTM II p.160.

63.Alex.Summary Tribunal 28.2.1914 GTM IV no.230.

64.No such disagreement has been found in my research before 1929,and indications of later disagreement are not apparent. This legislative change was a further retrocession of power to Egypt.

65.MCA(P) 13.12.1910.The procedure was similar to obtaining a decision of the House of Lords in England as the view of the plenary session was binding on future trials.

66.MCA(P) 29.4.1914,interpreting Art.68 MCC.

67.MCA(P) 13.4.1910,interpreting Art.610 MC Civ.Proc.,later incorporated in Law no.31 of 1912.

68.See Oeuvres du Congrès National Egyptien,1910,undated, Cairo,Chapter 8 pp.183-195,ascribed to Abdel Salam Zohni.

69.9.5.1911 BLJ XXIV p.213.

CHAPTER SEVEN

1916 TO 1925.

Introduction.

The years 1916 to 1925 were very much a time of change in Egypt. Hussein Kamel reigned until 1917,when Fuad I became Sultan and later King.Great Britain made a declaration of intent at the end of February 1922 concerning the future of Egypt,to meet Egyptian aspirations for a more independent position,and unilaterally declaring the Protectorate at an end.In April 1923 Fuad promulgated a new Egyptian Constitution based on the Belgian Constitution,and Article 30 of this expressly allowed different jurisdictions to continue,thus preserving the status of the Mixed Courts.

Although negotiations began between Egypt and Great Britain in order to seek a base for future cooperation,nationalist feeling increased,often violently,and Sir Lee Stack,Sirdar of the Egyptian Army and Governor-General of Sudan,was murdered in Cairo in November 1924.In 1921 the Milner Commission had reported[1] on the changing situation,and had advised a different approach to dealings with Egypt.In 1923,on July 5th. Martial Law was abolished and on July 18th. an exchange of notes took place between Great Britain and Egypt concerning the terms of service of foreign officials in the Egyptian administration and services.

Thus this chapter discusses The Mixed Courts,Martial Law and the War,followed by The Mixed Courts and Foreigners.The topic of immunity is further considered,in The Mixed Courts and Government Immunity,which looks at both foreign and Egyptian Government immunity,as well as a new direction in litigation in suits against the Egyptian Government for public order responsibility. General Jurisprudence covers,amongst others,cases on natural law and equity,companies,sale of goods,hire-purchase,and disputes on the value of 'francs'.Finally,the innovation of Plenary decisions of the Mixed Courts,a brief description of Structural Development,and A View from Other Courts,conclude the chapter.

The Mixed Courts, Martial Law and the War.

The immediate effect of the Ist.World War was that the German and Austrian judges were given extended leave of absence over the summer of 1914, and then until the end of their agreed tenure, when they were not reappointed. The British Consular court was given jurisdiction in cases between Germans and between Austrians in place of the German and Austro-Hungarian Consular courts, and by a Military Proclamation in January 1915 all persons resident in enemy territory were declared incompetent to commence or continue civil actions in Egypt, unless especially licensed to do so by the Military authorities.

The Mixed Courts decided, in the case of Princess Fatma Hanem[2], that the logical consequence of this Proclamation was to cause the striking out of all appropriate cases. It did not however mean that persons resident in enemy territory were under any incapacity as regards suits against them, and these were allowed subject to the service of proper notice on the defendant. The same applied to enemy aliens, and in a case in 1916[3] it was held that service on the domicile of an enemy alien was proper service, or if no domicile was known then the notice should be served on the Parquet. Only if the Parquet stated that it was unable to inform the defendant of the service was the notice deemed to be incorrectly served. In the same year it was held [4] that notice served at the domicile in Egypt of an Egyptian exiled to Malta was proper service. His residence in Malta was only temporary and thus the defendant's real domicile was in Egypt.

The purpose of service in Egypt was the same as in any organised system. A defendant had a right to know that proceedings had begun against him, and he was entitled to sufficient time to prepare a defence. The care with which the Mixed Courts upheld this ideal during the years of Martial Law mirrored their desire to treat, subject to the law, all persons equally, whether they were enemy aliens, resident in enemy territory, or exiles.

A leading decision of the Mixed Court of Appeal[5] held that enemy aliens were to be treated with fairness within the laws. The purpose of Martial Law rules against enemy trade was stated to be the frustration of enemy commerce, and not directed against enemy property as such but rather against the usage that might be made of that property to the prejudice of Egyptian or Allied interests.

To that end, liquidators were appointed for enemy companies and businesses, although the Mixed Courts interpreted 'enemy business' quite loosely. In one case a partnership had been validly constituted in Egypt with a majority of the partners of German nationality. It was held[6] that the other non-German partners could carry on business during the war, and the firm was not dissolved. This was a further application of the principle that the courts looked behind the face of partnership deeds and other documents to see the true nature of what was involved. The alternative decision in this case would have been to the prejudice of Egyptians and foreigners in business with nationals of enemy states, and the effect of the actual decision was to allow the former to continue trading without the enemy aliens.

The Mixed Courts prided themselves on a fair approach, and a further case in 1918 typifies their even-handed attitude. A German owed a small amount of money in Egypt, and had all his assets seized because he was unable to defend the action properly. It was held[7] that this was unfair, and the seizure was lifted. The court went to some length to explain that the fact the defendant was an enemy alien did not excuse an unfair and heavy-handed approach, and in the circumstances the penalty of seizure was not warranted.

The Mixed Courts had to decide on other questions concerning the war and Martial Law. One of the most important was the Affaire Auguste Faget[8], where the court upheld a saisie administrative levied against Faget's property to enforce collection of the Ghaffir tax. This tax had been decreed by Proclamation of the 23rd. September 1915, and it was held

by the court that the tax must be paid.It will be remembered that some foreigners declined to pay taxes,claiming that they were not bound to do so because of the various treaties with Egypt and the Ottoman Empire.The Proclamation enforced this Ghaffir tax without distinction and the Mixed Courts upheld its application to foreigners without question.

A dispute over a Proclamation regulating leases was the major case in this period concerning Martial Law and its effect on contracts.In 1921 an Egyptian sued a foreigner in the Mixed Courts for rent calculated according to the Proclamation.The defendant claimed that the Proclamation was invalid as a law affecting foreigners because it had not been approved by the Capitulatory Powers.In addition, he claimed that the Egyptian Government and the British Authorities had no right to continue Martial Law when Egypt was at peace.It was held[9] that both these arguments failed.The court said that the Treaty of Versailles had implicitly and incontestably given sufficient authority to the Commander in Chief of the British forces in Egypt to issue Proclamations.Further,the time limits of a state of siege giving rise to Martial Law were a matter for the sovereign power and could not be questioned in the courts by an individual,and finally the juridical fiction of extra-territorial rights could not be extended to contest the right of the authorities responsible for law and order to declare a siege(and therefore Martial Law) erga omnes.

This was a valuable judgement,not only because of the unequivocal recognition of Martial Law by the Mixed Courts but also because the judgement stated clearly the benefits of a unified application of Proclamations to all the inhabitants of Egypt.Proclamations were used by the British in many ways to reform areas of the law, especially the criminal law,and the attitude of the Mixed Courts to arguments over Capitulatory Powers' permission for such Proclamations showed that there was little judicial support for the notion that foreigners were able to hide behind Capitulatory disagreement in order to make

a privileged place for themselves.The further approval of the courts for the right of Egypt and Britain to continue the state of siege for as long as the two countries thought fit is also in keeping with Egyptian courts deferring to the rulers of Egypt in matters of public policy.

Finally,the application of the Treaty of Versailles in the domestic forum was again upheld in 1923[10],when the Mixed Courts allowed a plaintiff,who was the Public Custodian of Enemy Property,to sue on a Bill of Exchange drawn to the order of a German firm seven years after its due date.The defendant owed money on the Bill of Exchange in 1914,and the claim was made in 1921,so he put forward as his defence the prescriptive time bar.The plaintiff countered with the provisions of Art.300 of the Treaty, that provided for a suspension of prescriptive periods during the war.It was held that the Treaty of Versailles applied in Egypt despite the absence of any formal Egyptian approval,because it had been expressly so extended by an English Order in Council,and by Proclamation of the Commander in Chief of the British forces in Egypt,and thus the plaintiff was able to recover the money owed.The court clearly felt that to ignore the Treaty's provisions because of the absence of formal approval by Egypt would be against the spirit and purpose of the Treaty itself.

The Mixed Courts and Foreigners.

The years from 1916 to 1925 saw hundreds of cases disputing or claiming foreign nationality.The upheaval caused by the Turkish defeat in the Ist.World War,together with the Mandates granted to Britain over Palestine and to France over Greater Syria,as well as the continuing change in political status of much of the Near East,meant a huge increase in the number of decisions regulating the competence of the Mixed Courts in the context of the nationality of litigants.Did their jurisdiction over foreigners include ex-Ottoman subjects of newly independent states?

The definitive judgement concerning Receivers appointed by the British to control Ottoman property was given in 1919[11].Action was taken against an Egyptian on behalf of a Turkish prince whose property was sequestrated.The Egyptian defendant pleaded that the case was between two native persons and therefore belonged in the Native Courts,and not the Mixed Courts.The Mixed Court of Appeal held that the Receiver had the same national character as his principal where a third party was involved,and therefore the Receiver of Ottoman property was to be treated as an Ottoman.As the British Protectorate had not affected either the status of Ottoman subjects nor the status of Egyptians as native subjects[12]the correct court for disputes between Ottomans and Egyptians was clearly not the Mixed Courts but the Native Courts.

Another major area of importance,and one where there were conflicting opinions amongst jurists,concerned the status of Russians.Since the 1917 revolution the Imperial Russian state had been replaced by the Soviet state,but Egypt did not recognise Soviet Russia either de facto or de jure.Nevertheless,the Russian consuls in Egypt had been appointed by a government now overthrown,and it had been Imperial Russia and not Soviet Russia that had agreed to the jurisdiction of the Mixed Courts over Russians and other foreigners.

Most difficulties were avoided by allowing the Russian consuls to continue de facto as before,with the aid of an allowance from the Egyptian Government,and by assuming that the appropriate Russian law remained the Imperial law.Problems did arise however when Egypt announced on the 11th.October 1923 that it would cease to pay for or recognise the old Russian consular officials.

Shortly afterwards the Mixed Courts had to decide whether a plaintiff was a Russian subject and therefore a foreigner.A certificate was produced from the archives of the old Russian consulate,given by the former Russian consul,stating that the plaintiff was Russian.Should this be taken as conclusive?It was held [13] that the withdrawal of de jure recognition from the old Russian consuls in Egypt did not deprive Russian subjects of their nationality and their privileges as foreigners,and the question to be asked was whether Russia was still a distinct and separate state,or whether it had been conquered or annexed by another,foreign,state.The court decided that Russia was still a sovereign state,albeit unrecognised by Egypt,and Russian nationality could still be recognised as a legal status.

The next question was as to burden of proof.If there was no valid consular authority,how could Russian nationality be proved?The court decided that a certificate from the former Russian consul was admissable evidence which raised a rebuttable presumption[14].In the absence of any contrary evidence the court was entitled to decide the question of nationality on the evidence that it had before it.

The main consequence of this case was that Russians remained foreigners for the purposes of the Mixed Court, despite the change in their domestic regime,and two further cases illustrate the Mixed Courts' attitude when dealing with Russian matters.

In 1924,Egyptian creditors arrested a Russian ship in Egyptian waters.A question of priority arose because

there was a competing claim on the vessel by its crew, who based their rights on a judgement of the Russian consular court in Egypt in 1922.This latter court had used its certified lists of Russian seamen as authority for the judgement against the ship,as well as deciding the claim by Russian Imperial law.What were the Mixed Courts to do?It was held[15]that the court could not consider Soviet law because Soviet Russia had not been recognised de jure.Thus the only Russian law applicable was Imperial Russian law which was deemed to be in force for the consular courts,and consequently the Russian consular court had been entitled to give judgement in favour of the seamen.As their claim predated the attachment of the Russian ship by the Egyptian creditors the seamen had priority.

This was a very practical result.Apart from the fact that Soviet law was uncertain and difficult to prove at the time the need for some continuity of practice prompted decisions based on practical commercial needs,and the results of applying Imperial Russian law were generally satisfactory.

In the Hamarvy case[16]it was held that the inheritance rights of Russians in Egypt were to be determined by Imperial Russian law,and not by the new Soviet Law of Succession.Thus the certificates issued by the former Russian consuls were again accepted as valid for setting out distribution rights.The only question that remained was one of jurisdiction.Which court had jurisdiction for Russian personal status questions?As there was no consular court,was it the Mixed Courts,who often decided these matters as incidental questions,or was it the Sharia courts as the residuary Egyptian courts of personal status?The arguments were thus between the Mixed Courts as Egyptian courts of general jurisdiction over foreigners,and the Sharia courts as the general personal status courts of Moslem countries[17].There was no particularly satisfactory answer,and both courts claimed and took jurisdiction in differing circumstances.It was probably the reluctance of

most heirs to waste time,effort and money in challenging jurisdiction that prevented more conflicting answers.As it was Imperial Russian law was accepted as the correct law to apply in both systems,and this also contributed to the reluctance of most parties to dispute the jurisdiction of whichever court was first seised of the case.In fact, the Mixed Courts should not have dealt with personal status at all,and later judgements developed a more helpful approach[18].

So far as other foreigners were concerned the Mixed Courts continued to decide the cases carefully and with reliance on established law.

In 1913 Platon Agapios,a local workman,sued the Sanitary and Quarantine Council of Egypt for damages after he suffered an accident on property owned by the Council.On the 23rd.January 1914 the Alexandria District Court decided that it was not competent to hear the action because Agapios was a local subject suing a local association. Agapios appealed,and the Mixed Court of Appeal heard the action in 1920[19].There were two main factors[20].Agapios claimed that he was a foreigner because he was an Ottoman subject born in Cyprus(although he was resident elsewhere from 1913 to 1919)and since the 1914 Order in Council declaring that Cyprus was annexed to Great Britain he claimed that he was entitled to be treated as a foreigner with British protection.This claim was not upheld.It was clear that no British nationality or even protection was automatically accorded to persons who were born in Cyprus. The court,however,went on to accept jurisdiction between Agapios and the Sanitary Council because it held that the Council was an international organisation of a mixed character.It had first been set up in 1881[21] and reorganised in 1893[22].There were 18 delegates on the Council,with 14 from the Capitulatory Powers and four from Egypt.Thus it was a mixed interest organisation and the Mixed courts were competent in its actions with natives.Even though Agapios failed in his claim to be a foreigner the result of his action for damages was the same because he was still heard by the Mixed Courts.It provides a useful example of arriving at the same result desired but by a rational route.

In a later case in 1920[23] it was held that a plaintiff from Lemnos, which was ceded to Greece by Turkey under the Treaty of Athens in 1913, was entitled to opt for Greek nationality. Egypt, despite not being a signatory to the 1918 Convention accepting the 1913 Treaty of Athens, was entitled to accept the provisions of the Convention, and thus the plaintiff was held to be Greek. As the defendant was also Greek, the Greek consular court was held to be the correct forum.

It may be noted that the Mixed Courts were careful to review which Conventions had been signed or accepted by Egypt and which had not. The decision as to whether a change of nationality was valid was very much linked to the view of the Egyptian Government in foreign affairs, and the Mixed Courts kept within the guidelines of public policy.

In 1922 the case of Melkanian caused the Mixed Courts to investigate further the interrelationship between Ottoman nationals and Egypt's status as Ottoman territory until 1914. Melkanian was born an Ottoman subject in Asiatic Turkey, but he had been inscribed as a Greek national on the island of Syra. In 1911 he had applied to the Turkish authorities for permission to take Austrian nationality and this was granted, subject to his continued acceptance of Ottoman nationality when he was in Ottoman territory. He later applied to the Egyptian Government for recognition as a Greek subject, and this was granted in 1914. Later however this recognition was withdrawn because he had taken Greek nationality and asked for recognition of it while Egypt was still part, albeit nominally, of the Ottoman Empire. These facts all required a close analysis of the relevant laws, conventions, and practices of the day. It was finally held[24] that he was Greek. The production of documents certifying nationality should be accepted unless the contrary was proved, and because there was no law of nationality in Egypt it was up to the courts to decide such questions. It was up to the party alleging fraud to

adduce evidence to that end.

The principles thus expressed were far reaching.The number of persons claiming a foreign nationality had begun to be so large that the courts were deluged with disputes.In the absence of a nationality law the Mixed Courts were really the only courts with the ability to investigate and decide such complex questions,and they did so with characteristic efficiency.The concept of nationality was comparatively new in Egypt.Previous categories of status had been simply religious,or as between foreigners and Ottoman subjects.In the 1920s it became necessary to categorise even further into distinct nationalities,and to decide on difficult problems with much research and consequent learning.In this field the Mixed Courts led the way and showed how even complicated questions could be answered satisfactorily with diligence and reasoned analysis and logic.

A further effect of the Ist.World War was the question of the status of those enemy aliens who had renounced their nationality.It was clearly an embarressment for local subjects if they had been protected by countries at war with the Allies,and many had renounced their protection in such cases.It was usual,however,for such renunciation to be officially communicated to the authorities concerned,but it was held[25] by the Mixed Court of Appeal that a local subject who was under the protection of Austria-Hungary could unilaterally renounce his protection because of the lack of diplomatic relations between Egypt and his protecting power.Once the renunciation had taken place he reverted to his original personal status.

Further cases clarified more detailed points.In one[26] it was held that local subjects who were appointed as consuls for foreign powers reverted to their original local status when out of office,and thus foreign protection only existed so long as the person concerned was working for the foreign government.This was in line with the practice prevalent in the Ottoman Empire and seems a logical

approach to avoid excessive and unwarranted opportunities for people to change their status permanently.

The Mixed Courts were also faced with the problem of indeterminate foreign nationality.This difficulty was solved by treating litigants simply as foreigners where there was any inability to distinguish an exact foreign nationality.Thus a defendant who claimed he was Roumanian was held to be a foreigner despite a certificate from the Roumanian consul that he was not Roumanian.The court argued that the defendant was certainly not local,and therefore he must have been a foreigner,and his dispute with an Egyptian plaintiff therefore belonged in the Mixed Courts[27].This view was accepted in later Mixed Court of Appeal decisions that made it clear that the Mixed Courts were for all true foreigners in Egypt regardless of whether they belonged to a Capitulatory Power or not,and regardless of whether the exact foreign nationality could be determined[28].

It must be emphasised however that if no exact foreign nationality could be shown the Native Courts had jurisdiction for criminal matters.In the absence of a consular jurisdiction over crime the Native Courts were the correct Egyptian tribunal[29].Thus the 'Roumanian' would have been a foreigner for the purposes of civil cases in the Mixed Courts,but he would have been tried in the Native Courts for crimes.

There was a great deal of discussion as to whether the same reasoning would apply to Palestinians,Syrians,and Lebanese, who were ex-Ottoman subjects and foreigners in political terms,but previously treated as within the Native Courts for all judicial process.No firm answer was reached judicially, but there were agreements regulating the status of Libyans in Egypt,who could opt for Italian nationality unless born and domiciled in Egypt[30],and also intergovernmental discussions on the status of Lebanese and Syrian citizens in Egypt following the French Mandate of Greater Syria[31].

It was the Mixed Courts that declined to allow Italian status to Libyans born and domiciled in Egypt,and this was the beginning of a concept of domicile in Egyptian law.In previous years it had hardly been necessary to assess

nationality unless it was to see if a foreign interest or nationality created a mixed interest.Then it had become necessary to determine foreign nationality as against Ottoman nationality, progressing to a need to define that foreign nationality,and by the end of the years 1916 to 1925 the Mixed Courts started to develop the strands of an Egyptian jurisprudence on domicile,based on their deliberations as to nationality.It had again been left to the jurists of the Mixed Courts and the judges to research this area,and their efforts form another major contribution to Egyptian jurisprudence.In 1926 the Egyptian Government passed a law on nationality,utilising the decisions of the Mixed Courts over the immediately previous years.

The Mixed Courts and Government Immunity.

There were nine important cases in this period concerning government immunity.Three related to ships,and the first was the Sumatra affair[32].A British vessel owned by the British Crown collided with a Spanish vessel in Alexandria harbour.There was an action for damages against the Master who claimed that the court had no jurisdiction because the vessel was a government ship as the property of the Shipping Controller.In fact the ship was on a commercial voyage and not commanded by a Royal Navy officer but by a civilian.

It was held[33]that the ship was on a private voyage for a purely private purpose.There was no question of an exercise of the powers of state in a public capacity,and to allow an immunity from jurisdiction would be a denial of justice because it would have the effect of depriving private individuals of relief when faced with the private interests of a state.The judgement clearly rejected any claim of sovereign immunity[34].In fact,the court went on to decide that the British ship was not at fault,although the importance of the case is to the point of jurisdiction.

The second case also concerned a British ship.The S.S. Huntscastle had been chartered by the British Admiralty for the transportation of troops.An Egyptian worker died in an accident involving the vessel and his next of kin sued both the British Admiralty and the ship's agents in the port.The District Court awarded damages against the agents,but refused to hear the action against the British Admiralty.On appeal it was held[35]that the court had rightly refused to hear the action against the Admiralty because the Huntscastle was an armed ship in the military service of a government,and commanded by a regular officer.The court said that there was no doubt that the ship was employed on public duty and not for private use.

The Mixed Court of Appeal also stated that the local agents were not liable because they only noted the ship's arrival and departure,and could not be said to have any responsibility over the vessel's working.In view of their capacity as agents

this was perhaps an unnecessary addition to the judgement unless the Mixed Courts were prepared to hold the agents responsible despite their principal's immunity,but in any event that question did not arise.

The third case concerned a ship belonging to the Hejaz government.She was arrested in Egyptian waters for an alleged debt,and her local agents claimed sovereign immunity because she was a public vessel usually used for defence purposes.Actually she was in use at the time for transporting pilgrims,and was not then armed.The court held[36] that this was a case of a public vessel on a private commercial venture,and so no question of immunity arose. Immunity could not be granted to states acting as ordinary civil persons,and so the court accepted jurisdiction over the ship.An interesting point is that the court cited Belgian authority as well as previous Egyptian jurisprudence.

Apart from these naval matters the Mixed Courts had other governmental disputes to resolve.In 1918 an Armenian resident in Egypt subscribed to an Armenian Republic loan at a branch of the Bank of Athens.In 1920 Armenia was captured by the Soviet Russians,and the Armenian claimed back his money from the bank.The Bank of Athens alleged that it only held the money on behalf of the Armenian Government,and only the latter was able to dispose of it or order repayment.It was held[37] that the plaintiff was entitled to the return of his money.The loan had become a deposit without object because the purpose of the loan(to help the Armenian Republic)was no longer possible.The Soviet Russians had declared an express intention to absorb Armenia into Soviet Russia and destroy its independence.After assessing the facts,including the avowed intention of the Russians,it was held that Armenia was no longer the same country that the plaintiff had lent money to,and thus had ceased to exist for the purposes of the loan.

Although the decision was entirely reasonable on its own facts it is worth stating that Egypt had a considerable Armenian minority,and the Egyptian Government had still not recognised Soviet Russia de jure.In the circumstances

therefore the decision was also a popular one because it avoided any detriment to Egypt's Armenian population who had enthusiastically welcomed the appearance of an independent Armenia,and had lent considerable sums of money to the new Armenian Republican Government.

Later the same year the Mansourah District Court affirmed a decision of the Summary Tribunal that the Mixed Courts had jurisdiction over the Palestine Railways.It was held that the Railways were a private commercial venture of the Palestine Government and thus not immune[38].In 1924 the courts refused a claim against the Greek consulate for an apartment let to the consul because the consul was a career diplomat (missi)and within the category of officials that could only be sued if they involved themselves in commerce.This was not the case over the apartment,and the action failed[39].Later that year the French Government,through its Caisse Nationale d'Epargne,was refused immunity over its banking functions[40]. The court declared that the exercise of banking functions, mostly by providing savings accounts,was a private act,and no immunity attached to the Caisse d'Epargne by virtue of its Governmental connections.

All these cases illustrate the continuing assessment of questions involving governments.Regardless of whether the governments were British,French,or other Arab Governments, or their consular agents,the Mixed Courts viewed each set of facts impartially and fairly,and on the same legal basis. Were the acts public or private?The changing mood,however,of domestic politics meant that the Mixed Courts also had to judge the responsibility of the Egyptian Government towards law and order and its consequences.

There were riots in Alexandria in 1921,and an onlooker on a balcony was shot by a policeman.A claim against the Egyptian Government was rejected by the District Court because it felt that the Mixed Courts were not competent to consider the acts of the police as these were acts of sovereignty of the Egyptian Government.The Mixed Court of Appeal held[41]that the police were indeed part of the state

apparatus of law and order,but their actions could be reviewed judicially if considered as administrative acts.The court felt that the Government had employed and armed an unskilled person,and was therefore liable for its servant's negligence[42]. After hearing evidence the court awarded compensation to the victim for the injuries sustained.

This was a potentially damaging judgement.How far would the courts go?When did the actions of the police cease to be acceptable risks in the service of the public and become negligent ?The concern felt by the Government at the outcome of this case was increased by another shortly afterwards.

In this case[43]the plaintiff claimed damages from the Egyptian Government for repairs to his car,which he alleged was damaged by a mob demonstrating against opponents of the Government.It was alleged that the police deliberately ignored popular agitation against the Government's opponents, and thus exhibited a lamentable degree of carelessness or inactivity.It was held that questions of sovereignty were inapplicable if the police were so guilty of excessive negligence in their normal duties of impartial application of the law that citizens were left unprotected.In this case the court felt that the evidence showed the Government was at fault,and held it liable for the costs of repair to the vehicle[44].

These cases were worrying for the Egyptian Government,but seen in the context of a wish not to alarm foreign residents, and the embarrassment caused by the publicity,no moves to amend the law were made and the judgements of the Mixed Courts stood as sound and valid precedent.It may be remarked that these two judgements were a bold defence of citizens' rights,and took place in the absence of any statutory provisions entitling innocent citizens to claim against the authorities for riot damage.

General Jurisprudence.

The years 1916 to 1925 saw an ever increasing number of disputes before the Mixed Courts.Indeed,in 1925 alone the courts dealt with 23,683 cases,on a wide variety of subjects.

Amongst the many disputes were those requiring a further application of the rules of natural law and equity,especially in the field of family support.In 1922 it was held[45]that the provision in the Codes[46]which obliged people to support relatives was insufficiently clear,and thus it was up to the Mixed Courts to decide which relatives should be supported. The basis for decision was Art.11,the provision allowing for the use of natural law and equity,and the court used this to adopt a socially responsible attitude.It made it especially clear that natural children were entitled to use the law to gain support from their parents or other relatives[47],and in so doing established a precedent of family obligation well suited to the cosmopolitan cities of Egypt.The alternative to enforced support from the family was penury,or at best charitable relief,until the person concerned was able to support himself.By establishing clear rights for young and old relatives the Mixed Courts clarified the Codes on this point and ensured a measure of justice for those previously without much hope.

Apart from that extension,few developments took place in the field of natural law and equity,although it had again been decided that use could not be made of Art.11 when the law was clear[48].A further case allowed the Mixed Court of Appeal to declare that in the absence of agreed provisions relating to party walls the court should look at those rules of equity inspired by both moslem and foreign law[49].

Only one useful case on companies appeared.The Mixed Court of Appeal held[50]that the requirements for a company to be regarded as genuinely Egyptian included formation in Egypt, under Egyptian law;capital paid,held,and contributed in Egypt;board meetings and principal establishment in Egypt;and if a company had an office for sale in Egypt it should have a

corresponding office for purchase.This was of course part of the approach of the Mixed Courts to companies,and can be seen to continue the reasoning of previous decisions[51].

Several sale of goods questions arose.In one[52]there was a sale of Welsh coal,and the seller was unable to deliver.He pleaded that there was an export ban from Great Britain,and the military authorities in Egypt had requisitioned all available coal ,so that he was neither able to import the contract goods nor buy them locally.It was held that the circumstances amounted to vis major:-'il s'agit d'un fait du prince très caractérisée'.

In a later case on coal[53],where an Egyptian bought coal from a seller in England,war broke out before delivery.The seller informed the buyer that no delivery was possible but the latter took no action.Several months later however the buyer formally demanded the coal and sued for damages.It was held that,apart from the obvious excuse of vis major,if a buyer allowed a seller to believe that he had agreed to the termination of the contract,he could not later demand performance[54].The buyer's silence had amounted to a waiver.

Another case concerned grain bought for seed,where it was decided that it must be delivered before the end of sowing[55], or else there was a breach of contract,because the obvious purpose of the sale was prevented.

Two shipping cases illustrate some general points.In a contract for the carriage of goods by sea the shipper agreed a rate of either PT per ton or per cubic metre,at the shipowner's option.For the type of cargo involved this latter formula would have produced a cost eight or nine times as much as the former.The shipper had already refused a previous contract with another carrier at a quarter of the price the second formula would have created.It was held[56]that in the circumstances the contract must be a nullity because the difference between the two methods of arriving at a price for the carriage must have meant that there was no valid agreement[57].It is worth noting that this principle was not restricted to carriage by sea,and as expressed applied

regardless of the relative bargaining position of the parties.The courts were not so keen though to protect parties to another shipping contract where the shipowner excluded any liability for his Master or crew,even for negligence.It was held that this was an allowable clause, although the courts would supervise carriers closely because they often had a monopoly and could use this as a bargaining point in imposing unfair and unreasonable terms[58].It was felt that the particular exclusion clause complained of was not,in the circumstances,unfair or unreasonable.

Three hire-purchase cases are relevant in the tapestry of a continuing development of hire-purchase law.In the first,it was held after detailed analysis that there was no reason to prevent,and considerable jurisprudence to allow for,the sale with a reservation of title of goods sold on instalment terms.Property would only pass on payment of all the sums due,and if the buyer failed to pay as agreed he would forfeit the sums actually paid to the seller[59]. It also followed that the seller could repossess his property. This was quite a harsh decision,especially when the probable value of the recovered goods,even at secondhand prices,is considered,and a later case held[60]that the court was entitled to look to natural law and equity,and to the Italian and French Codes[61]if it wished,to find reasons to modify penalties provided for in a hire-purchase deal.Given the fair approach of the Mixed Courts this allowed some scope, perhaps restricted by the view of freedom of contract,for a benificial modification of such terms.

Egyptians and foreigners in Egypt took to hire-purchase quickly,and many people overreached themselves.The attitude of the Mixed Courts provided a balance while the real meaning of instalment sales and reservation of title became more generally known as cases were heard and their findings published.

A particular problem of hire-purchase was the status of innocent third parties who had bought goods from someone who had them on hire.It was held[62]that an innocent purchaser

for value and without notice of the hire was not to suffer from the seller/creditor's reservation of title.This was an important step,especially as the proof of ownership of chattels was difficult,and it allowed the unencumbered sales of goods.If the original owner sought a remedy it was against the hirer,and not against the innocent third party.

In 1922 the important Suez Canal Company case concerning an interpretation of 'francs' was heard[63].The dispute was between the Canal Company and the Compagnie Havraise de Navigation à Vapeur,and over the question of whether payment should be made in French francs or Egyptian gold francs.The Egyptian franc was 1/20th.of the value of the gold 20 franc piece,and as it was linked to gold was a constant monetary unit.The French franc was not so constant and the changing economic fortunes of Europe meant that the Egyptian franc was much more valuable than the French franc. If the Suez Canal Company could enforce payment in Egyptian francs it would gain considerably,and to the consternation of many observers it succeeded.That decision led to another more important case.

The Societé General des Sucreries et de la Raffinerie d'Egypte had issued bonds with coupons for the payment of interest. Bondholders,led by the rich Greek industrialist Cozzika, pressed for payment in gold francs,but the company claimed that it could choose to pay in Egypt,or in France,at its option[64].If it paid in France it would seek to pay in French francs,still worth much less than the Egyptian franc.

The Cairo Commercial Court[65]upheld the company's contention, but the Mixed Court of Appeal disagreed and ordered payment in gold francs[66].By this decision the fortunes of many bondholders were made,especially that of the Greek industrialist Cozzika,and the result caused great debate in the financial community.The uncertainty of repayment stemmed from the wording of the various coupons,and no clear idea could be gained either by financiers or simple bondholders as to whether their particular coupons were expressed in terms of

Egyptian gold francs or French paper francs,although only the Egyptian franc was legal tender in Egypt,and a presumption towards this more valuable unit was often argued.

The situation was further complicated by the Suez Canal Company and the Heliopolis Company case.This was decided [67] in favour of the bondholders,confirming the decision of the Cairo District Court,so that the repayment of loans and interest was in Egyptian francs with their gold value.The case was renowned in Egypt for the advocacy it involved,and the strength of feeling that it aroused.

In the end,the question resolved itself simply.Future issues of coupons and any other financial instruments or charges using the word 'franc' were expressed in clearer terms,and Egyptian commercial men realised the necessity of protecting against fluctuations in currency by expressing contracts in clear and unambiguous terms.There were,nonetheless,to be further cases in later years on the meaning of 'francs'.

Three further decisions are worthy of mention.In 1917 the Mixed Court of Appeal stated that arbitration clauses providing for an overseas arbitration were not generally to be upheld because it was a matter of public policy that the Mixed Courts were the correct forum for foreigners and Egyptians in dispute over contracts to be performed in Egypt[68].The Mixed Courts were not against arbitration,and there was usually no necessity to supervise arbitrators.When there was litigation on arbitrations it was mostly to do with public policy.It is important to consider however that the gentle fosteringof an arbitration tradition allowed the parallel,albeit minor,development of that form of dispute settlement,so that arbitration became part of the commercial life of Egypt.

Another case decided the obligations of the Tramways towards season ticket holders.It was held[69]that no damages were payable to holders of a season ticket for the trams when no trams were in operation because there was no contract on which to sue.It was only when the journey began that a contract was concluded,each and every time,so that damages

could be sought for events after the beginning of the journey only.A season ticket facility was a price paid in advance for convenience.Nevertheless,because it was a price paid for travel,any days on which no trams ran would give rise to a reclaim.

The decision was an interesting and well argued response to public transport problems,and shows much practical thought.The public transport system was always worked to capacity,and a balance had to be kept between a need to protect the contractual rights of ticket holders and the avoidance of a multiplicity of claims for the breakdowns that occurred.The court therefore took into account what might reasonably be expected of a carrier in such a situation.

The last general case involved the excavations in the Valley of the Kings.In 1915 Lord Caernavon was granted a concession to excavate,on condition that if the agreed terms were broken he would lose the concession.In 1922 the tomb of Tut Ank Amon was discovered,and amidst all the attendant publicity and interest Carter,who had by then taken over the concession, agreed with the Egyptian Government for opening times in 1924.A certain day was set aside for the Press,but Carter wanted the families of his associates to be allowed to visit that day also.The Egyptian Government refused,and so Carter closed down the site.Five days later the Ministry of Public Works decided that the site must be reopened,and on the 20th.of February 1924 annulled the concession and sought to take over the area.

In an action before the Mixed Courts it was held[70] that the courts could not even hear the action because the granting of permissions to excavate ancient tombs was a matter for the Ministry of Public Works,and within its public power and duty. In fact,the very terms of the concession were enough to allow the site to be closed,but the court refused to hear the case.

This was an unfortunate affair.Opinion was divided between support for Carter and support for the Government,and the Mixed Courts skillfully steered a path through the controversy and decided on a purely legal basis.In fact,Carter and the Government later agreed to settle the matter peaceably.

As well as the selection of cases above,there continued a healthy but by now uniform jurisprudence on trademarks and the protection of intellectual property[71],and this area developed in keeping with commercial and industrial progress. In fact,the commercial life of Egypt had benefitted greatly from the stability of Egyptian law,and the development of the Mixed Courts mirrored the financial progress of Egypt[72].

Over the years even more ambitious plans for new laws and codes began to draw on the jurisprudence of the Mixed Courts,and as these progressed the value of the ideas developed and considered by the courts increased.The years to 1925 laid the foundation for the reforms passed in 1937, and the 50th.anniversary of the courts in 1925 was celebrated with pride in the scholastic and judicial contribution of the Mixed Courts to Egyptian law.

Plenary decisions of the Mixed Courts.

There were several declaratory plenary decisions.In 1916[73] it was held that appeal notices in criminal(police)matters did not have to give reasons,and the greffier could accept such an appeal in the usual way.The decision led to a reform of the Mixed Code of Criminal Investigation on the basis of the Native Code,and this was effected by the Legislative Assembly of the Mixed Courts under Art.12 of the Civil Code,producing Law no.11 of 1917 for new Articles 153,153bis, 154 and 175 of the Mixed Code of Criminal Investigation.

In 1917[74]it was decided that the provision that a pledge was cancelled if the pledged goods went back to the person who had pledged them[75]was not applicable to third parties involved in the purchase or sale of such goods who might otherwise lose title through no fault of their own,and this led to Law no.50 of 1923,modifying Art.663 of the Mixed Civil Code.

In 1922[76]the plenary session decided that a judge had to satisfy himself that some loss had been suffered before a sum agreed in a contract could be awarded on breach.The plaintiff was unable to demand the sum agreed without proof of some loss.This was a welcome clarification of the position regarding penalty clauses and put the plaintiff to proof,although not so far that he had to show the sum agreed was the same as his actual loss.Therefore if no loss was suffered at all the agreed payment clause was not upheld.

Later the same year it was held that the Procureur-General was unable to appeal against acquittal by the Tribunal des Contraventions[77],and in 1925 the plenary session declared that stock exchange dealings were acts of commerce and therefore should be heard by the Commercial Court[78].Also in 1925 it was stated that only the Mixed Courts were competent to hear possession actions relating to a Mixed Court judgement, regardless of the nationality of the parties[79].

These declarations illustrate the problems that were referred to the plenary session,and it can be seen that

some were later codified.Unfortunately there is at least one instance of parties refusing a reference to the plenary session because of the costs.In the Affaire Khouri Haddad[30] the parties decided to settle out of court and share the money in dispute rather than face the additional costs.This attitude on the part of litigants was very unfortunate although quite understandable in terms of the costs and the risk of delay.It does not appear to have had a great effect on the number of refusals,although these may be found occasionally.The other problem of plenary sessions was that they caused the work of all the Mixed Court of Appeal to stop so that the judges could assemble for full deliberation. In exchamge for these inconveniences however conflicts between judgements were settled by declarations accepted as binding on the Mixed Court system.

Structural Development.

The main fact under this heading was the renewal of the Mixed Courts for an indeterminate period in 1921[81],with an expiry date to be fixed,at the Egyptian Government's option, at least a year in advance.Some confusion had arisen because Italy and Holland delayed their acceptance of certain renewals in 1916 and 1921,but these problems were speedily dealt with by the Government,and the Capitulatory Powers all agreed in time to the 1921 extension.The fact that the renewal was indefinite,and not restricetd to a year or five years,was a measure of the general confidence in the courts.

A Proclamation of the 15th.October 1919 had removed claims for damages resulting from civil strife after March 10th. 1919 from the normal courts and gave them to a special Commission expressly set up for the purpose,and this ensured that the workload of the Mixed Courts was somewhat eased.

The impetus for reform of the entire Egyptian legal system was continued by W.Brunyate,who had been the English Judicial Adviser.He also attempted to introduce English as an everyday language in the courts,rather than simply a nominal official one,but he was not successful.All his reforms were met with opposition,not least from the French,and despite over one hundred meetings to March 1918 all the schemes were abandoned. Brunyate was also accused of trying to 'Indianise' the Egyptian legal system,and although there were ambitious plans for fusion of the various jurisdictions and the rewriting of some laws none of these came to pass.

A View from Other Courts.

In 1918[82] an English case concerning British subjects in Egypt discusses the Mixed Courts and their place in the Egyptian system[83], and in 1925 another case from the British consular court also reviews the Egyptian situation[84]. These are noteworthy in that the English courts had an informed and respectful knowledge of the Mixed Courts, and it can be seen that their reputation was good[85].

In Egypt itself the British consular court gave way to a decision of the Mixed Courts, although it had already seized the goods in question[86], after pressure from London to comply with general policy of support from Britain for the courts. No concessions were made as to the law, and it is clear that the British consular court disliked giving way, but did so on the unambiguous advice of the Foreign Office.

Finally, in Sudan it was held that although a judge should choose English rather than Egyptian law if he had a choice, because he would be more familiar with English law[87], nevertheless there were instances when reference to Egyptian law was obvious, for instance when a lease was drawn up in Egypt[88], and so should be construed with reference to Egyptian law, or because Egyptian rules as to growing crops were appropriate for a Moslem society such as Sudan[89]. Such a reference could conveniently be made to the Mixed Codes, with which most judges in the Sudan, English or Egyptian, would be familiar.

The above cases illustrate that the Mixed Courts were referred to in other countries, as would in fact almost be expected in Sudan and Great Britain, and show judicial approval quite free from the pragmatic political support given by the British government.

Notes to Chapter 7.

1.Egypt No.I,1921,HMSO Cmnd.1131.
2. GTM V p.192.
3.MCA 17.5.1916 BLJ XXVIII p.336.
4.Mohamed Abdel Rahman v Jacques de Menasce,(date uncertain), BLJ XXVIII p.404.
5.Lindemann & Co. v Antoine Parachimance,MCA 13.12.1916 BLJ XXIX.
6.Stern Bros. v Aly Mohamed Solim,MCA 17.6.1915 GTM V p.145.
7.MCA 18.6.1918 BLJ XXX p.473.
8.Auguste Faget v Moudir of Behera,Summary Tribunal Alex. 8.12.1917 Pres.Vaux GTM VIII p.50.
9.Ismail Pasha Sidky v Sidarous Bishara,Summary Tribunal Cairo 8.6.1921 Pres.Cao GTM XI p.162.
10.Hargreaves v Attalla,Summary Tribunal Cairo 29.5.1923 GTM XIII p.204.
11.Aziz Bey Hanki v Russell,MCA 30.12.1919 Pres.Bernardi GTM X p.91.
12.This had been confirmed in Nessib Geridini v Nessim Geridini,BLJ XXIX p.403.
13.Golovitschiner v Dori,Cairo District Court 24.12.1923 GTM XIV p.231.
14.The Mixed Court had accepted supporting documents as proof in the absence of consular authority in an earlier case:19.4.1923 BLJ XXXV p.377.
15.Theodore Gross v J.Gretchenko,Mixed Comm.Court Alex. 30.4.1924 GTM XIV p.235.
16.Hamarvy v Credit Lyonnais,24.1.1925(Summary Tribunal Alex.)Clunet 52 p.476.
17.Art.4 MCC excluded personal status matters from the Mixed Courts.It was the view of the Cairo District Court (19.1.1925)that the Sharia courts were the correct courts in such cases.See also Chapter 8 note 57.
18.Other countries had some difficulty choosing between Russian Imperial and Soviet law.The Tribunal of Athens used old Imperial law in January 1924,see Clunet 52p.1143, 1925,and the Berne Civil Court refused to recognise Soviet law because the Soviet regime had not been recognised,July

21st. 1924.See gen.AJIL,Vol.21,1927,p.253.
19.This was an extremely long delay,for which no reasons are apparent.
20.Agapios v Sanitary,Maritime and Quarantine Council of Egypt,MCA 21.1.1920 Pres.Laloe.
21.Decree 3.1.1881.
22.Decree 19.6.1893,following an international convention in 1892.
23.Photios Baltzoudis v Constantin Souliotis,MCA 22.4.1920 Pres.de Souza Larcher GTM X p.167.
24.Artaki Melkanian v Garabed Melkanian & others,MCA 7.6. 1922 Pres.Laloe GTM XIII p.74.
25.David Forte v Michel Malluk,MCA 12.12.1922 Pres.Hansson GTM p.171.
26.Chedid v Chedid,Mansourah District Court 7.6.1923 GTM XIII p.201.
27.Chokr v Katz,Summary Tribunal Cairo 12.4.1923 GTM XIII p.202.
28.e.g.whether Czech or Austrian or Hungarian:Abdel Moktader Soliman v Lieto Rahmin Youssef Salama,MCA 13.1.1925 Pres. Baviera GTM XVI p.115 & p.141.
29.Art 1 NPC:Le présent Code est applicable à tous ceux qui,en Egypte,commettent les infractions prévues par ses dispositions,à moins qu'ils ne soient,en vertu des lois, des traités ou des usages,affranchis de la juridiction des tribunaux indigènes.
30.Agreement 4.4.1923 between Egypt and Italy,and judicial interpretation:MCA 17.6.1924 BLJ XXXVI p.441.
31.Exchange of Notes between Egypt and France,14/16.3.1925.
32.Capt.Hall(Ministry of Shipping) v Capt.Bengoa,and Admin. des Ports et Phares,S.S.Sumatra v S.S.Mercedes,MCA 24.11. 1920 Pres.Laloe BLJ XXXIII p.25.
33.Laloe,the President,was French.The other judges were an Italian,an Englishman,and two Egyptians.
34.'Et attendu,en fait,qu'il n'a pas été allégué que le Capt.Hall,du Sumatra,fût un officier de la Marine royale Brittanique;qu'il n'a pas été soutenu non plus que ce steamer fût chargé d'une mission militaire;qu'il paraît resulter des pièces produites qu'il effectuait,tant ou moins

au moment où le quasi delit s'est produit,un voyage commercial sous la gestion de Lord Inchcape.'

35.William Stapledon & Sons v First Lord of the Admiralty & others,MCA 28.6.1923 Pres.Vaux BLJ XXXV p.542.

36.Commandant P Saglietto v Mohamed Tawill Effendi,Mansourah District Court 15.1.1929 GTM XIV p.251.

37.Achikian v Bank of Athens,Cairo District Court 11.1.1923 GTM XIII p.134.

38.Palestine Railway v Nicolas Mansouris,Mansourah District Court Pres.Boeg 11.12.1923 GTM XV p.93 ;Chapter 9 note 44.

39.Bennet v Ergastiriadis,Summary Tribunal Alex. 3.5.1924 GTM XIV p.180.

40.Giovanni Borg v Caisse Nationale d'Epargne Française, Alex.District Court Pres.Count d'Andino 29.11.1924 GTM XVI p.123.

41.Hoirs Halcoussi v Egyptian Government,MCA 3.1.1925 Pres. Vaux GTM XV p.80.

42.Following Art.214 MCC:Le maître est également responsable du dommage causé par ses serviteurs quand ce dommage a été causé par eux en exerçant leurs fonctions.

43.Karpinsky v Egyptian Government,Summary Tribunal Alex. 17.1.1925 Pres.Heyligers GTM XV p.81.

44.'...le manque de cette précaution élémentaire,constitue une faute grave de l'organe du gouvernement,chargé du maintien de l'ordre public'.

45.Dame Emilie Sulitz v D'lle.Artemis Miniakis,Alex.District Court 2.12.1922 Pres.de Herreros GTM XIII p.164.

46.Art.217 MCC:Les descendants et alliés au même degré,tant que l'alliance dure,doivent des aliments à leurs ascendants ou alliés au même degré.

Art.218 MCC:Il en est de même des ascendants à l'egard de leurs descendants ou alliés au même degré,et des epoux entre eux.

Art.219 MCC:Les aliments sont calculés eu égard aux besoins du créancier et aux ressources du débiteur.

Art.220 MCC:Ils sont toujours payables par mois et d'avance.

47.'Attendu que toutes les législations des pays civilisés qui constituent le statut personnel des justiciables des

Tribunaux Mixtes,reconnaissant aux parents naturels le droit des aliments,il y a lieu de déclarer que les articles 217 et 218 MCC s'appliquent aussi bien aux ascendants et aux descendants légitimes qu'aux illégitimes';this was some weeks later, 24.2.1923 GTM XIV p.40.

48.MCA 21.3.1918 BLJ XXX p.443.

49.MCA 29.3.1923 BLJ XXXV p.330.

50.Yorkshire Engineering Co.of Egypt Ltd. v Arthur Fendian, MCA 9.2.1916 BLJ XXVIII p.143.

51.See e.g. Chapter 6 note 13.

52.MCA 10.5.1916 BLJ XXVIII.

53.MCA 11.4.1917 BLJ XXIX p.358.

54.Note that enemy action or war risks and thus force majeure were not taken simply as factors that made the performance of a contract more difficult or onerous.There had to be a proper vis major:BLJ XXVIII p.260.

55.MCA 11.4.1917 BLJ XXIX p.360.

56.MCA 6.5.1917 BLJ XXIX p.426.

57.'l'erreur sur le prix...opère la nullité du consentement quand elle affecte dans une mesure excessive le prix, envisagé comme rapport principal du contrat'.

58.MCA 9.4.1919 BLJ XXXI p.236.

59.El Hag Mohamed el Isaoui v Gazmotoren Fabrik Dentz, MCA 27.6.1916 Pres.Bernardi GTM VI p.183.This accorded with a decision the previous month that penalty clauses were valid even if the loss was less than the clause provided or non-existent:'la clause pénale fait la loi des parties,grace à son caractère forfaiture'-MCA 4.5.1916 BLJ XXVIII p.301. See below note 76.

60.Singer Manufacturing Co. v Hassanein Hassan Karkir & Abdel Aziz Aly,District Court 31.8.1916 Pres.Cao GTM VII p.8.

61.Italian Civil Code Art.1214.French Civil Code Art.1231.

62.Thos.Cook & Sons Ltd. v Dessouki & Consorts,Mansourah District Court 27.6.1916 Pres.Peter GTM VI p.182.

63.MCA 9.2.1922 Pres.Eaman.On the same day the same court decided a similar case in favour of gold francs:Michel Pellegrini v Suez Canal Co.

64.Art.150 MCC:Lorsqu'une obligation est alternative,l'option appartient au débiteur,à moins d'une disposition spéciale de la loi ou de la convention.
65.4.3.1922 Pres.Peter.
66.MCA 8.5.1924 Pres.Cambas.The Egyptian gold franc was then worth 3.8575 PT,and the 20 franc gold piece was worth 77.15 PT.
67.MCA 4.6.1917 Pres.Vaux.There had also been cases involving insurance payments.MCA 24.1.1923 Pres.Cambas decided that benefits payable in Egypt must be paid in Egyptian gold francs because the usage of the country recognised Egyptian money unless otherwise agreed;Cairo District Court 19.2.1923 Pres. Giraud agreed with Egyptian francs when dealing with the Italian Assicurazione Generale,and so did the MCA 23.11.1923 Pres.Eeman,for the Compagnie d'Assurances Générales.The MCA 30.3.1922 Pres.Eeman declared that a term 'en bonne monnaies d'or,en franc francais' meant gold or gold's value.A later case,MCA 26.11.1924 Pres.Hansson indicated that there had to be a connection with Egypt for the Egyptian franc to be the relevant unit.If a contract was signed outside Egypt between foreigners there was a presumption against the Egyptian franc unless the contract mentioned Egypt.
68.MCA 9.5.1917 BLJ XXIX p.410.
69.Alex.District Court 26.6.1920 Pres.de Herreros,on appeal from Summary Tribunal Alex. 10.1.1920 Pres.Thorne.
70.MCA 2.4.1924 Pres.Eeman.
71.e.g.MCA 16.2.1921 BLJ XXXIII p.181,& MCA 13.6.1923 BLJ XXXV p.509(registration);23.4.1919 BLJ XXXI p.264(method for fixing filters on cigarettes could be registered;deposit of patent not a perpetual protection,but only for as long as depositor's home country allowed).
72.Ltd.cos.in Egypt:1875-6;1925-210.Capital:1875-LE 4.234M; 1925-LE 57.443M.Loans from mortgage cos.:1880-LE 1,127,851: 1925-LE 27,890,254.Cotton production:1874/5-LE 5.024M;1925-LE 65M.External trade:1880-LE 24,154,960;1925-LE 122,479,622. Alex.registered ship tonnage:1880- 1,008,817;1925 4,206,769. Population:1882-6,831,817;1925(est.)-14,055,000.Receipts of state:1880-LE 8,999,399;1925-LE 36,254,947.
73.MCA(P) 31.5.1916.

74.MCA(P) 4.1.1917.
75.Art.663 MCC.
76.MCA(P) 9.2.1922,interpreting Art.181 MCC:Lorsque le montant de l'indemnité en cas d'inexécution a été prevu par le contrat ou par la loi,le juge ne peut accorder une somme moindre ou plus forte.See above note 59.
77.MCA(P) 29.4.1922.
78.MCA(P) 4.2.1925.
79.MCA(P) 23.5.1925.
80.MCA 3.6.1924.
81.Decree 31.10.1921,effective 1.11.1921.
82.Casdagli v Casdagli [1918] P.89.
83.ibid.at p.91 et seq.
84.Bartlett v Bartlett [1925] A.C.377.
85.The English Court of Appeal on the 24th.Nov.1924,as reported in Livre D'Or p.159,was supposed to have followed the Alex.District Court in a decision concerning cargo on the S.S.Palitana.There is unfortunately no English record of this case.
86.Conceded 23.12.1924.Seizure by huissier of the Mixed Court 26.11.1924.
87.Antonious Saad v Aziz Kfouri [1919] S.L.R.I p.114.
88.Tewfik Abdel Sayed v Ahmed Hashim Baghdadi [1924] S.L.R. I p.227.
89.The Egyptian & Sudan Cotton Trading Co. v Receiver in Bankruptcy of Hakim & Co. [1925] S.L.R.I p.251,referring to Art.330 MCC and Glyfis v Planta BLJ XXVI n.15,see Chapter 2 note 19;Chapter 5 note 49;Chapter 6 note 41.

CHAPTER EIGHT

1926 TO 1937.

Introduction.

The years 1926 to 1937 were years of further great change,both politically and legally.The Egyptian and British Governments drew much closer to agreement on regulating the relationship between them,and after detailed discussions between the two countries a Treaty of Perpetual Alliance was signed in 1936[1]. At the same time rising nationalist feeling demanded less foreign involvement in Egyptian domestic affairs,and it became clear that the whole legal structure needed further reform to abolish the remaining consular jurisdiction.There were also growing demands that the Mixed Courts be reformed,or absorbed into a unified structure.It was of course this latter plan that had been so vigorously opposed by the Mixed Court's Bar and states such as France when proposed by Great Britain in earlier years. Nevertheless,reform was gradually accepted as inevitable,although even the possibility of lessening influence or absorption into a larger organisation could not dampen the celebrations held in Egypt in 1926 to commemorate the 50th.anniversary of the first Mixed Court cases.

Against this background this chapter deals with several topics. The first is The Mixed Courts and Foreigners,which provides a legal context for the many changes in the Mediterranean area in the 1920s and 1930s.Next is The Mixed Courts and Government Immunity,with more examples of the policy of the courts,including the controversial Egyptian Tribute Affair,and then The Salem Claim, an event which dragged the Mixed Courts unwillingly into an international arbitration between the USA and Egypt.In fact the Mixed Courts came out of the affair well,although the battle was more political than legal in the end.This leads to The Mixed Courts and Internal Conflict of Laws,and The Mixed Courts and Companies. A brief view of Taxation precedes a discussion on The Treaty of Alliance and Friendship with Great Britain,and The Montreux Convention.Finally,General Jurisprudence,and A View from Other Courts conclude Chapter 8.

The Mixed Courts and Foreigners.

Questions of nationality were still amongst the most numerous classes of actions in the courts.Greater mobility of workers in the 1920s led,almost inevitably,to more and more cases concerning persons who had held Ottoman citizenship and were now members of fully independent or Mandated territories.So frequent were dissenting opinions voiced that no-one really knew the status of those who had,before 1914,simply been accepted as local subjects because they were Ottomans,and the added complication of nationalist desire for reform,together with an improvement in the standards of the Native Courts, meant that the Mixed Courts were reluctant to claim an excessive jurisdiction over persons previously within the jurisdiction of the Native Courts.

The question really centred on the problem of the Palestinians, Syrians,Lebanese,Iraqis,and inhabitants of the Hejaz.It had already been considered whether nationals of Bulgaria and Roumania,for instance,were foreigners for the purposes of the Mixed Courts,but this had been decided for a comparatively small number of people,and over a long period of time[2].The international status of the Palestinians and other Mandated peoples free from Ottoman control was only settled by the Treaty of Lausanne in 1924,and from then on the Mixed Courts were under considerable pressure to decide whether Palestinians and Syrians,together with Lebanese,Iraquis,and people from the Hejaz were to be treated as foreigners for Mixed Court purposes or not.If they were,the Mixed Courts had jurisdiction over them in civil cases,just as if they were original parties to the Judicial Reform.In fact,there was little dispute that such nationals were subject to the Native Courts in criminal matters because they had no consular privileges[3],but the question of their correct forum for civil matters was hotly disputed,leading to many conflicting decisions.

There was no doubt that the nationals in question held a recognised foreign citizenship.For instance,a British Order in Council of August Ist.1925 had conferred a Palestinian

citizenship on residents of Palestine,and this matched with the loss of Ottoman citizenship after the Treaty of Lausanne[4]. These provisions did not,however,cover Palestinians resident in other Middle Eastern countries,and no great assistance was rendered in the overall argument as to whether Palestinians were within the jurisdiction of the Mixed Courts.

In essence,the problem was that people who had previously been Ottoman,especially from the Levant,moved freely in search of trade and work within the Ottoman Empire.Was their internal status in Egypt suddenly to change because their homeland was free from Turkish domination?

The first case to consider is Risgallah v Zahar[5],in 1926. It concerned a succession action,and the question to be decided was whether Syrians were within the jurisdiction of the Mixed Courts as foreigners.It was held that they were not.Several reasons were put forward.First,the court declared that Egypt had not yet recognised the Treaty of Lausanne,and so no status dependent on that treaty could be automatically recognised.Secondly,reference was made to the fact that France and Egypt had agreed that French protection for Syrians would not confer any immunity on them which they had not enjoyed before 1914.Thirdly,the Mixed Courts would not extend its jurisdiction over former Ottomans because the Ottoman Empire had submitted to the Capitulations and therefore could not benefit from them.

It is submitted that while the result of the case is correct the reasoning is not.Non-recognition of the Treaty of Lausanne was a technical matter,and could be settled by reference to Great Britain's ratification as Egypt's Protecting Power during the relevant period.The agreement between France and Egypt is a valid factor,especially given the tendency for judicial research amongst the decisions of the Executive,but it was actually a minor point.The third reason,that of an Ottoman submission to the Capitulations,and a consequent disability in claiming a benefit from them is completely erroneous.The Capitulations were mutually agreed treaties and in any event could not prevent the assertion of rights

by peoples no longer subject to them.

Later the same year Zachari Meckdachi & Bros. v Egyptian Customs Administration[6] decided that Syrians were foreigners for the purposes of jurisdiction.The Customs authorities had ordered Meckdachi's goods to be seized,and he appealed to the Mixed Courts.The Customs Administration claimed that the correct forum for the dispute was the Native Courts as the firm was Syrian,registered in Beirut under Lebanese law.It was held that the Treaty of Lausanne was recognised by the Egyptian Government[7],and that Syria,being an independent state,was deemed to have impliedly adhered to an extension of the Mixed Courts to her nationals.This was a case where the court clearly considered that the essential point was whether a party was a foreigner or not.In fact,the only relevant question was whether the Mixed Courts had jurisdiction or not,and the two concepts did not automatically coincide[8].

The next case declared that Lebanese were foreigners,and thus within the jurisdiction of the Mixed Courts.The plaintiff was a Lebanese who carried a passport issued by the French Mandatory Government.He made a claim against the Egyptian Minister of Public Works who alleged that as the plaintiff was an ex-Ottoman the correct forum was the Native Court.It was held[9] that Syria and Lebanon were 'A' Mandates,and therefore deemed independent,so that their citizens were foreigners.It was also held that the Treaty of Lausanne had been impliedly recognised by Egypt,and therefore a combination of these two factors gave the Mixed Courts jurisdiction.The court went on to say that there was no difference between Bulgarians and other ex-Ottomans,so that an extension of Mixed Court jurisdiction to the Bulgarians could be logically followed by the same type of extension to Turks,Syrians, Palestinians and others.

This series of cases finding that the ex-Ottomans were foreigners and thus transferred from the Native Courts to the Mixed Courts for civil matters was a matter of grave concern.To resolve the continuing disputes a reference was made to a plenary session of the Mixed Court of Appeal,and

in 1929 a definitive declaration was handed down[10].There were three questions for the consideration of the assembled judges.

Were the Mixed Courts competent in cases between Egyptians and nationals of non-capitulatory Powers[11]?Were ex-Ottomans within the jurisdiction of the Native Courts?Were the Mixed Courts competent when dealing with Egyptians and nationals of countries separated from the Ottoman Empire by the Treaty of Lausanne?

This was an opportunity to settle finally the apparently interminable disputes over jurisdiction when foreigners belonging to ex-Ottoman states were involved,and the plenary session rose to the occasion[12].It decided that the Mixed Courts were competent in disputes between Egyptians and nationals of non-capitulatory Powers,in so far as the rules that had,for over 50 years,regulated the class of persons who were within the jurisdiction of the Mixed Courts clearly meant all foreigners,whether belonging to Capitulatory Powers or not,contemplated by the organisers of the Reform in 1875.

As to ex-Ottomans it was clear that the Native Courts had jurisdiction,and no extension to the jurisdiction of the Mixed Courts would be allowed to change that situation unless the Egyptian Government agreed.Finally,the point at the centre of these disputes,that is whether nationals of countries newly separated from the Ottoman Empire were within the jurisdiction of the Mixed Courts was answered in the negative. The proper forum for such nationals was the Native Courts, as it had always been,and there was no justification for a change simply because those nationals were now the possessors of a foreign set of documents.

This declaration was very welcome.It showed a reasonable and well researched approach to jurisdiction,and once again the Mixed Courts had not simply taken over litigation to extend their own direct control of the law,but had viewed a complicated and potentially sensitive political situation impartially and with care.The decision was widely respected and duly

followed.

It must be noted that this declaration did not affect the status of Bulgarians,Roumanians ,and other ex-Ottomans who had been recognised officially,and for a long time,as entitled to Mixed Court jurisdiction.It was only the status of Palestinians,Syrians(including Lebanese),Iraquis,and inhabitants of the Hejaz,as well as Turks,that was in question.It is worth noting that the Egyptian Government's lawyers made a formal declaration in court that the Government would not contest the jurisdiction of the Mixed Courts over foreigners such as Germans and Austrians(who had lost all Capitulatory Privileges because of the Ist.World War),nor over Czechs and Russians,whose exact status was unclear. It may also be added that much of the confusion that did exist was due to a confusion between the term 'ex-Ottoman' as applying to nationals of countries such as Bulgaria, or Tunisia,and as applying to nationals of countries independent of Ottoman control because of the Ist.World War.

Thankfully the question was resolved,and the 1926 declaration of the plenary session put an end to these particular problems. In allowing people who were now foreign to remain within the Native Court jurisdiction,it may be remarked that the plenary session sowed the seeds of an eventual system that was more closely Egyptian staffed than the Mixed Courts and which had jurisdiction over foreigners and natives.The thought that people,whether from the Middle East or not,who possessed foreign papers could be within the Native Court jurisdiction had been unthinkable a generation earlier.

Apart from the pressing problem of the ex-Ottomans,the Mixed Courts also had to deal with the assessment of other nationalities.This task was usually one of immense difficulty because of frequent border changes since the turn of the century,but in so far as the Mixed Courts were the only suitable tribunal,by virtue of the training and experience of the personnel,the task was carried out to the general satisfaction of most parties.

Several cases illustrate the problems involved.In the

Damianos case[13] the plaintiff had enrolled as a policeman in the Egyptian police in January 1910.He was an Ottoman subject from Crete,and as an Ottoman he was not entitled to a pension. By the Treaty of Athens in 1913 Damianos was given the right to opt for Greek nationality,and did so.He continued to serve in the police until 1924,and on retirement claimed a pension on the basis of a 1923 law setting out the terms of retirement for foreigners in the Government service.

The Cairo District Court agreed with the Government's claim that he was not of foreign nationality for the purposes of retired pay,but the Mixed Court of Appeal overturned this decision.It was stated that the link between Turkey and Crete had ended after the Balkan Wars,and the Treaty of London of the 30th.May 1913.Thus the foreign nationality in question had been taken up before 1914,and should be recognised on that basis,without reference to any treaties relating to the Ist.World War.Thus Damianos was duly entitled to a pension.

In another case[14] an Austrian Slav had been employed by the Egyptian Government in June 1907.In November 1914 he had become protected by Russia,and after the war his place of origin,Dalmatia,became Yugoslav.He too claimed the benefits of the 1923 law for the retirement of foreigners in the Government service.It was held that he was a local subject. None of his changes in nationality or protection derogated from his status at birth,which the court assessed as Ottoman[15].

Many other nationality disputes required adjudication.It was still possible to register at foreign consulates to get foreign papers,but with the development of the concept of a firm status of nationality,something more than mere registration was required[16].This was so whether it was a question of recognition of Egyptian nationality or a foreign one,and the provisions of the Egyptian Law of Nationality of 1929,which provided for a certificate of Egyptian nationality to be issued by the Minister of the Interior, were held to provide only a declaratory statement,which did not actually grant nationality,and could therefore be investigated by the courts [17].

The Mixed Courts were thus prepared to look critically at nationality claims.The experience they had built up in researching historical and geographical changes was now applied to seek the true nationality,that is the true substance as the Mixed Courts saw it,and not just to accept the form. They were also prepared to find in favour of Egyptian nationality if the circumstances were appropriate.Where,therefore, a person had been registered as Spanish until 1934,but had since been inscribed on the civil register of the Egyptian Government,and had received a certificat de rachat militaire in 1907,the Mixed Court of Appeal held him to be Egyptian[18].

Some countries required persons who had renounced their nationality to follow certain procedures to reestablish it. One such country was Italy,but the Mixed Courts held that despite the procedural rules of the foreign law,they were entitled to decide nationality on the basis of an assumed jurisdiction according to the spirit,rather than the letter, of the relevant law[19].

What effect had all these cases on Egyptian law?Apart of course from reflecting the highly diverse and cosmopolitan background of many of Egypt's residents,the necessity for the Mixed Courts to go behind the face of documentary evidence,and investigate properly the real facts in these complicated disputes,was a continuing element in the whole approach of the Mixed Courts.They were not content to rely on form but instead sought the substance of a matter.They carried on a policy of judicial research into all topics before them and,in this series of cases,apart from the well-argued and respected results,there developed further a rational and thinking approach to nationality law.This was reflected in another way by the 1929 Egyptian Nationality Act which used the vast amount of material produced by the Mixed Courts as a foundation.It was to the Mixed Courts that Egypt owed its legal attitude and approach to nationality.

The Mixed Courts and Government Immunity.

Between 1926 and 1937 there were many important cases involving governments before the courts.The most important one was the Egyptian Tribute affair,which concerned millions of pounds and occupied the diplomats and politicians,as well as the lawyers,of both Egypt and Great Britain for many years.

Egypt had paid an annual tribute to Turkey since the 16th. Century.In 1841 the amount had been agreed at £282,000,but this was increased to £681,872/4/5d per annum after negotiations in the 19th.Century[20].Turkey in its turn pledged this tribute income for its own foreign loans,so that it was arranged that Egypt paid directly the bondholders of Turkey's overseas debt,as a matter of administrative convenience.In 1891 and 1894 the loans were restructured[21]and Egypt again agreed to pay her tribute to Turkey's creditors directly. It was expressly stated that 'cette somme serait prélevée sur le Tribut Egyptien que Nous et Nos successeurs devons et devrons au Gouvernement Imperial Ottomane'.

This link between the obligation to pay a tribute to Turkey and the agreement to pay the bondholders direct was viewed as vital,and after the Treaty of Lausanne the Egyptian Parliament,on the advice of Saad Pasha Zaghloul,the Prime Minister,suspended payment to the bondholders on the grounds that Egypt's obligation to Turkey was no longer operative.

The suspension of payments unleashed a storm of protest from those who had lent money to Turkey on the strength of Egypt's agreement to pay the tribute directly to them,and two bondholders,Selim Sasson and Matthew Pattison,sued the Egyptian Government in the Mixed Courts.In the meantime,the Government prudently set aside the money in an account at the National Bank of Egypt.The affair was seen as a matter of great national interest,and Conseiller Royal Rossetti tried, on behalf of the Egyptian Government,to have the dispute heard by the Permanent Court of International Justice at the Hague,but without success.

Another writ was issued against the Government,this time by Messrs.Rothschild who held a major part of the loan stock,and the actions were consolidated before the Cairo District Court.The arguments were straightforward.The Government contended that its obligation to pay tribute to Turkey had ended because Turkish sovereignty had ceased,and therefore,whatever means of payment had been agreed the original obligation to pay no longer existed,and therefore there was no debt capable of assignment.The bondholders claimed that Egypt owed a wholly separate obligation to pay money directly to the bondholders,and that this was not affected by Turkish sovereignty.

The two arguments were forcefully put.The Procureur-General of the Mixed Courts,van den Bosch,was even moved to declare in court that 'pour une nation,faire honneur à ses dettes est la plus précieuse garantie de son prestige,et la condition première de son crédit devant le monde'.Thus the Egyptian appointed head of the Parquet Mixte was moved to declare himself against the view of the Government.He was not alone in this approach,and the court held[22]that the Egyptian Government was unable to refuse to pay its debts to the bondholders.The court rejected a preliminary claim of sovereign immunity,giving as an added reason to the established view of private and public acts the fact that the type of dispute viewed as a question of sovereignty by the Constitution in Art.141 and Art.154 did not include contracts with creditors in these circumstances.

Egypt's obligation to repay the bondholders was taken as a commercial matter.The principle of rebus sic stantibus which was pleaded by the Egyptian Government was not applicable because the 1891 loan was repayable over a fixed period of 60 years,and so a change of circumstance was irrelevant.In addition,there was no dispute,the court said, over the true meaning of the clear and unambiguous terms.

This was another landmark in the history of the Mixed Courts. The political implications of deciding the case at all were serious,even considering the narrow view of sovereign immunity

that the courts had taken,and the rejection of sovereign immunity in this case was clearly based on the idea that Egypt's obligations to the bondholders were contractual obligations to individual creditors,and should simply be considered as debts agreed and due.The Egyptian Government of course was still convinced that the essence of its agreements with the bondholders was its tribute to Turkey, and appealed.

Almost a year later the Mixed Court of Appeal affirmed the District Court decision[23].It set out clearly that the notion of sovereignty was not applicable to the repayments because they were not within accepted limits of public authority.As the courts were not free to examine questions of public law concerning the tribute,but were able to apply contractual principles to the agreements in question,the result was evident.Egypt,although released from its obligation to Turkey,had made a unilateral promise to repay certain sums to certain bondholders,and it did not therefore matter that this promise was without consideration and based on an extinct obligation.

This decision pleased the bondholders but did not please Egypt,or the British Government.It seemed an unduly narrow interpretation of Egypt's agreement,although it was within the strict letter of the particular promise to pay the bondholders.Egypt had always assumed that the payment to the bondholders was linked to the tribute.To alleviate the financial effect on Egypt the British Government agreed to pay over part of the reparation paid by Turkey to Great Britain in order for Egypt to use the money for repayment of the loans[24].

Once again the Mixed Courts had held the Egyptian Government liable to pay a large sum of money,and once again Great Britain felt bound to pay the money herself to Egypt.The case demonstrated the independence and strength of the Mixed Courts,but did not cause the same discussion as the Dongola case had in the 1890s.Nevertheless,it cannot be said that it endeared the Mixed Courts to the Egyptian Government,and the

decision,correct as it could be shown in strict law,was unfortunately given at the same time as rising nationalism was making political capital out of Egypt's debts to foreigners.

The next case was more mundane,and concerned a villa in Cairo furnished and let by the Sudanese Government.It was held that such an act was private,and not a manifestation of public authority,so that the Mixed Courts had jurisdiction[25].The decision is useful because it distinguished between the Sudanese Government in its official capacity and in its private dealings.In the circumstances,the renting of the villa was a private act per se,but the purposes for which villas generally were rented meant that each case had to be separately considered.If it had been the Sudanese Embassy,for instance,there would have been immunity from suit.

Heinrich Finck v Egyptian Government[26] concerned a German bookseller whose claim against the Government alleged that he had suffered loss through the imposition and operation of martial law.Finck had left Egypt on October 15th.1914, of his own volition,and had entrusted the management of his bookshop to friends,Schmidt,a German,and Hofman,an Austrian. On the 2nd.of November war broke out with Turkey,and Egypt was placed under Martial Law.Schmidt and Hofman were deported and interned in Malta,and the bookshop stock was sequestrated and sold.The plaintiff claimed he had therefore lost LE22,583, and alleged that the Egyptian Government were to blame because they had entrusted the defence of Egypt to a country at war with Germany,and had thus failed in their obligations to protect German enjoyment of foreign privileges in Egypt.

The argument was based on Egypt's obligation to subjects of Capitulatory Powers.If the claim had succeeded Egypt would have been faced with hundreds of similar cases,and so in addition to a straightforwrad defence that Egypt was not responsible because it had not actually seized or sold the books,the Procureur-General intervened and asked for dismissal of the action on the grounds of the overriding supremacy of Martial Law.

Finck claimed that the Government were liable because the Council of Ministers,on the 6th.August 1914,had called on the Commander in Chief of the British forces in Egypt to defend the country against any states at war with Great Britain.As this allowed the British to impose Martial Law,and as his goods were sold by virtue of Martial Law provisions,he held the Egyptian Government liable for his loss,which resulted from the fact that all the proceeds of sale were absorbed by the cost of the sequestration.

The Egyptian Government were content to plead that they were not responsible for the sequestration,although Finck made it clear that he felt their action in placing the defence of Egypt in British hands was in fear of such an illusory attack as to make the delegation of power a futile,arbitrary and improper act in violation of international law.

The court would have none of that argument.It pointed out that it was presumptious of a German,at the time,to accuse the Egyptian Government of a violation of international law when,the court said,it was a matter of history that Germany had violated international law herself by the inexcusable bombardment of Bône and Philipeville,the internment of French citizens of all ages in Germany,the invasion of Belgium,and the sinking of merchant vessels and mail steamers of neutral states.An allegation based on international law could only be put forward,in essence,when the proposer was himself free of guilt,directly or by association.It was almost the principle of coming to equity with clean hands.

The court also declared that it was only prudent of Egypt to guard against Germany's methods in pursuing war, especially in view of the attack on Egypt a few months after war was declared between Turkey and Great Britain,when a German-officered Turkish Army Corps crossed Sinai.

The argument that Egypt was somehow ultra vires in allowing Britain to impose Martial Law was dismissed as based on a misconception of Egypt's capacity with regard to foreign relations.It was further declared that Egypt was de facto at war with Germany,if not strictly de jure,and so Finck's

claim was also dismissed for the reason that it was an inadmissable challenge to an actus imperii[27].

The judgement was upheld in the Mixed Court of Appeal[28]. In addition to the defence of actus imperii it was held that the Law of Indemnity[29] which covered damages arising out of Martial Law,and which provided a special series of tribunals for claims relating to Martial Law,was a further reason for the plaintiff's suit in the Mixed Courts to be dismissed.If,and this point was not expressly decided, Finck had any sort of valid claim for the way that the sequestration had been carried out,it was for the appropriate tribunals and not the Mixed Courts to decide.

The judgements of the Cairo District Court and the Mixed Court of Appeal were clear and reasoned.The judges could have simply dismissed the claim for any of the reasons stated,but chose to answer all the allegations made against the Government and showed how they felt the claims were incorrect.It must be remembered that judgements of the Mixed Courts were usually studied closely by educated people in Egypt,and indeed by others also,and judges were very conscientious in preparing their opinions,especially where cases were likely to be used as signals for litigation by others.The clear and emphatic rejection of Finck's claim played its own part in avoiding similar actions by other people who had suffered from Martial Law.

Two months later the Egyptian Government was sued again,this time by a shipping line which had suffered damages due to the impounding of a consignment of rifles on its way to the Hejaz.The order impounding the rifles was lifted after four months,and the authorities tacitly admitted that they might have been in error in seizing the weapons.The Mansourah District Court said that it had jurisdiction to hear a claim for damages,but the Mixed Court of Appeal held[30]that the government order was a purely political act based on its assessment of the circumstances,and on the feeling that it would be wrong to allow Egypt to be used as a base for arms supply to two Moslem peoples in dispute.

Fighting in the Hejaz had developed into a civil war,and the court went on to say that there had been no infringement of the rights of foreigners,and thus no grounds on which to claim damages,because trafficking in arms was a venture to be carried on only at the risk of those engaged in it.The decision was a welcome one for the government,not only for the particular case but also because any fettering of its employees' rights to seize contraband cargo from foreigners would have allowed a repetition of the abuses of some foreign traders in the 19th.Century.The Egyptian Government was taking over many more executive functions from the British,and this case made certain that the exercise of these functions was not a question for the courts to decide upon.

The Soviet Government of Russia was defendant in a later case concerning ships.The National Navigation Company of Egypt had lost a vessel,the S.S.Conti,when its crew mutinied and took her to Odessa,where a Soviet court ordered the ship's confiscation.It is probable that the crew were Russian nationals.The Navigation Company therefore sought the seizure of two Soviet ships which were anchored in Alexandria harbour, as security for its claim against the Soviet Government.The Soviet's local agent claimed that the Mixed Courts had no jurisdiction,and it was held that however illegal the seizure of the S.S.Conti was,it had been ratified by the Soviet Government,if not itself a manifestation of that Government's sovereign authority.Consequently,the Mixed Courts could not hear the action against the Soviet Government,even though it was not yet recognised de jure by Egypt.The reality of the situation was that it was a state exercising sovereign uthority,and therefore the claim was dismissed.The fact that the Soviet Government was regarded with distrust at the time, and was not recognised de jure by most countries,nor even de facto by some,did not deter the court from concluding against the shipping line.[31].

In 1930 the Turkish State Tobacco Monopoly appeared before the Mixed Courts.This large and influential organisation claimed that it was an agency of state,and therefore immune

from suit.The Mixed Court of Appeal held[32]that this was not so.Its management was simply 'actes de gestion',and it could be sued in the same way as any private person.

An unusual case concerned the issue of a visa for Egypt in Buenos Aires.On arrival in Egypt the visa-holder was refused permission to land and his visa was cancelled by an inspector of police on orders from the Minister of the Interior.The visa-holder sued the Government in the Mixed Courts,and rather surprisingly won.The court held[33]that the cancellation of a visa was a violation of a vested right,and as visas were not given at the applicants' risk the plaintiff's claim for damages succeeded.The only reason on which this case can be justified is that the issue of a visa created some form of agreement with the passport holder,so that cancellation of the visa was akin to a breach of contract.Nevertheless,the issue and withdrawal of visas is generally an act of public order and this case must be viewed as unique.

One result of the rising feeling of nationalism in Egypt was a strong Press Law to close anti-Government newspapers.After the closure of a foreign owned newspaper under this law the owner successfully sued the Government for damages[34].He alleged that the relevant regulations concerning newspapers were not applicable to foreigners because the Mixed Court of Appeal in General or Legislative Assembly had not agreed them,as required for laws affecting foreigners.The court agreed.The Government's claim that the press regulations were not reviewable by the courts was dismissed.

The case caused trouble in many ways.The Government was forced to consider securer methods of suppressing the newspapers that it disliked,and no great victory for freedom of the press was hailed generally because Egyptian-owned newspapers were not protected by the decision.It was only foreign-owned anti-government papers that felt they had won a victory,and the result irritated the nationalists and the Government,of course for different reasons.So far as the law was concerned,however,the decision was correct.

In 1934 the issue of whether the telegraph company was

responsible for the service it offered was the subject of litigation.Telegraph links were essential in Egypt,both for domestic and external use,and it was frequently the case that telegrams were delivered incorrectly or not at all.In view of the heavy telegraphic traffic this was not unexpected but the question was whether a sender or recipient had a right of action against the telegraph company.Such a right could have been very valuable in view of the possible consequences of non-delivery of telegrams in commercial or financial dealings.The court held,however,that the telegraph company was not liable[35].

The relevant material was held to be the International Telegraph Convention of St.Petersburg in 1875,as amended in London in 1912,which provided that no legal claims could be made for the operation of a telegraph system[36].The Convention also provided that private parties working for a government in its telegraphic operations were to be treated as part of the state telegraphic servce[37],and further that the state was not liable for those private companies[38].All in all, therefore,whoever operated the Egyptian Government's telegraph system was as immune from suit as the Government itself,and the claim was dismissed.

The decision was another example of the application of international agreements to cases before the courts,and was also in tune with commercial reality.No-one could guarantee that all telegrams would be delivered correctly,and there was no reason for a different approach in Egypt from the rest of the countries with telegraphic services.The alternative would have been to allow numerous claims against the telegraph company,with a consequential increase in basic costs.

The Mixed Courts had occasion to consider other international rules in a negligence case over an accident involving a British Army lorry.An Egyptian woman claimed damages from the Army after an accident in which she was injured.The British army investigated the incident and decided that it was not to blame,and the victim sued the Commanding Officer in the Mixed Courts.It was held[39]that the courts had no jurisdiction.Although there was neither a written convention

between Egypt and Great Britain,nor an Egyptian decree, giving immunity to the British forces,it was recognised as an international concept that a special immunity existed for an army of occupation in the course of its duty:'l'usage international reconnaît une immunité spéciale aux armées d'occupation'.Consequently,there was mo liability.

The decision is valuable in several respects.First,it was another example of the application of international legal usage to a situation where no particular rules had been developed.Secondly,it was a judicial recognition of the British Army of Occupation,combined with the observation that it made no difference whether the British Army was there with the consent or only the tolerance of the Egyptian Government and thirdly,it started the development of a theory of military immunity of great value in later years when events relating to the 2nd.World War were before the Mixed Courts.It is worth noting that the court commented that a different result would probably have been given had the accident not occurred while the soldier driving the lorry was on duty.

The final case in this area concerned loans of the Egyptian Government itself.In 1931 the holder of 41 shares in the Dette Privilegiée Egyptien 3.5% demanded payments on his coupons in gold or its equivalent in Egyptian currency.The Government refused,and two Commissioners of the Dette sued the Egyptian Government on the bond-holder's behalf[40].The Cairo District Court said that it had jurisdiction to hear the case,but the Mixed Court of Appeal reversed that decision[41] and agreed with the Government that no Egyptian courts had jurisdiction in actions concerning this state loan.

This was not only because of a strict adherence to the terms of the 1904 Dette agreement,but also because the operation of a state loan was now not something which the Mixed Court of Appeal was prepared to decide upon,and the claim was dismissed.This approach,albeit on a different loan,may be contrasted with the attitude of the courts concerning the advance of money for the Dongola expedition in 1896[42].Changing times had allowed changing agreements

for loans,and a more sympathetic view of government claims to immunity in public financial contracts.This view did not of course extend to private agreements such as the Turkish Tribute repayments to various bondholders,discussed earlier.

It is useful to add that the Procureur-General,who was Hugh Holmes,an Englishman,dissented from the Egyptian Government and the Mixed Court of Appeal in his opinion.He felt that the Mixed Courts did have jurisdiction over the loans,but his view did not prevail.

It may be emphasised again that there was no system of administrative courts in Egypt.This was a deliberate omission from the framework of the courts in 1875,and the absence of such administrative courts did not create any particular difficulties.On the contrary,the fact that the government was subject to the same law and the same judges as other litigants,save only in matters of sovereignty,was a positive factor in the idea of equality before the law. All the above cases drew on the rich seam of material collected over the years by the Mixed Courts,and were vital for the next period of this history when the rules of military and foreign immunity became of overriding importance,following the declaration of the 2nd.World War.

The Salem Claim.

In 1932 a dispute between the Egyptian and United States governments was finally resolved.The facts were complicated, and the United States Government sought to reopen diplomatic means of settling disputes between American citizens and the Egyptian Government.It will be remembered that this was one of the abuses that the 1875 Reform was designed to prevent, but the United States was forthright in its demands for compensation both for alleged mistreatment of an American citizen,and for alleged breach of treaty rights.The matter was eventually settled by a panel of arbitrators ,but the attitude of the United States,especially in its condemnation of the Mixed Courts,makes the incidents leading up to the arbitration very important.

The basic facts were as follows.George Salem was born in 1883,in Mehalla el Kobra,one of the Delta towns.The family were Christians from Damascus,and George Salem was educated in Egypt and Syria,with his higher education at the Khedivial School of Agriculture in Cairo.At some stage of his residence in Egypt Salem's father had become a protegé of the Persian Consul.

In 1903 Salem studied in the United States,and graduated in 1905 in agricultural science.He worked as an agricultural expert in America for four years,and in 1908 became a naturalised American citizen.Before that time he described himself as Egyptian.In 1909 Salem returned to Egypt and continued to work in agriculture,even obtaining registration as an expert at the Native Court in Cairo.He was,however, suspended from the experts' roll for six months in 1918,and he was also dismissed in 1913 from the post of Secretary to the Khedivial Agricultural Society after 15 months in the post. Salem's main source of income in this time was from working as the manager of agricultural holdings,especially his uncle's cotton fields.By all accounts he had been used to a high standard of living in the United States and Egypt,and he was an ambitious man,not without some incidents placing a question mark over later claims of an unblemished character.

Salem had to travel to the United States to renew his passport,and this was done for one year in 1913.In 1914 he went back to the United States to try and gain another renewal, this time with supporting documentation from his uncle to show why he should need to remain in Egypt after having become an American citizen.The plea from his uncle Goubran that George Salem was desperately needed to help him manage his affairs was not heeded,and in time Salem's American citizenship lapsed[43].

In 1915 Salem was under criminal investigation,and the local authorities did not know whether to treat him as a foreigner or not.If he were foreign the authorities were uncertain whether he was Persian or American.The American consul though was quite certain.In reply to an enquiry from the Governor of Cairo the consul replied that Salem was no longer an American citizen and not entitled to the protection of the United States[44].This was a constant theme of the American consulate throughout several legal proceedings against Salem,and the Americans made no effort at all to help him then.

In 1917 Salem induced his uncle to sell him 330 feddans of land.At the time the uncle was seriously ill,and the transfer became the most serious event of Salem's life.The uncle later called for the attendance of a Substitut from the Native Parquet,and swore out a deposition in which he denied selling any substantial part of his estates,although he would not blame anyone in connection with the document purporting to transfer the 330 feddans.A few days later the uncle died.

A week after the uncle's death the heirs recognised the transfer document as valid(thus impliedly denying that any forgery or duress had occurred)and Salem transferred back the 330 feddans to the estate.The net result was as if no transfer had ever taken place,and the inference may be drawn that Salem was unsure of his ability to defend any accusations of illegality and this agreement between the family was an appropriate way to deal with the matter.

Atthis stage the Persian consul intervened and claimed to exercise his right as consul of a Persian family to administer the estate and levy a fee of 6% of the value[45].This claim was resisted by the entire Salem family,who all stated that they were Egyptian and thus not under the jurisdiction of the Persian consul.It is important to note here that the American consul again denied that Salem was an American citizen,this time in reply to an inquiry from the Persian consul.In the event,the Cairo District Court(that is the Mixed Court) appointed Salem's aunt as administrator of the estate because there was clearly doubt over whether all or even some of the family were Persian or Egyptian.

The Persian consul was determined to manage the estate and levy a 6% fee.As the procedure of handing back the 330 feddans to the heirs was done in such a way as to reduce the value of the estate on death for valuation purposes the Persian consul,fearing a consequential loss of income from the administration,brought criminal charges against Salem for forging the original transfer,and intervened as a partie civile to claim compensation.This charge was brought in tne Native Court,which appointed an expert to authenticate the signature of Salem's uncle Goubran on the transfer,but the expert reported that it had been forged.

Salem was therefore summoned before the Native Criminal Court in February 1919,although he managed to obtain several adjournments.He was even granted an Egyptian passport to travel to England,France and the United States.In France he obtained an emergency United States passport,and later in 1919 he obtained a new American passport in Washington.

Meanwhile his lawyer in Egypt had paid over LE 5,000 to the Persian consul and the latter withdrew his allegations of forgery.The trial of Salem was still due to go ahead,however, and in 1921 the American Agent in Egypt informed the Egyptian Government that Salem was now recognised as an American citizen.This was presumably because of the passport renewal. In fact the case did not go for trial until 1922 because Salem was still abroad.By this time the American consul had

demanded and received all the papers in the case,and started an investigation into the alleged forgery himself.The result was that he decided not to prosecute Salem,and as the Egyptian Minister of Justice had,in his discretion,discontinued the Native prosecution pending the American consul's enquiries, and had agreed to leave the matter to the consul,Salem was at last able to have the transfer acknowledged as genuine.

This was a very fortuitous conclusion to the case.The evidence against Salem was not overwhelming,but sufficient to be seriously considered,and in the circumstances of the inheritance,the rules against sales in death sickness,and the irregularities in some of his previous dealings,Salem was fortunate that after diplomatic pressure the American consul was given charge of the case.Salem was not content to leave the matter there.

In 1923 Salem sued the Minister of Justice in the Mixed Courts for LE 96,000 damages,but this action was dismissed in 1924[46].It is interesting to note that Salem tried to withdraw the claim once the Minister appeared ready to defend the action,but the court refused and proceeded to decide on the merits of the suit.On appeal by Salem the claim was held to be receivable but without foundation,and the action was dismissed again[47],although not before the Substitut of the Parquet in charge of the case made certain comments about the claim and Salem's character that were unwise.There is in fact no evidence to suggest the Mixed Court of Appeal paid any attention to the comments,although they were seized upon later by the American Government as alleged proof of an official campaign against Salem,who had persuaded the American authorities that there was a case for damages.The United States Government decided that his treatment was a slight on Americans,and pressed for damages for four years,between 1926 and 1930,by every diplomatic and political means possible.

This was a surprising move.The diplomatic claim for damages was an old abuse of power that had been done away with in 1875.No government was able to force a payment out of Egypt

by diplomatic pressure when an approved and respected system of Mixed Courts could be used,especially when these courts were not afraid to find against the Government in appropriate cases.Indeed,the American State Department had originally suggested to Salem that he sue for damages rather than press a diplomatic claim,but the matter had now become political,and the United States wished to be seen to be taking some positive and successful action.The efforts of the United States were,however,quite contrary to the spirit and letter of the Judicial Reform,and themselves a snub to the Mixed Courts.

Salem's case had been investigated twice,and was twice found to be without foundation.Despite this the United States were determined to pursue the matter,regardless of the effect on the Mixed Courts or more broadly on Egyptian nationalist opinion.In all the circumstances of the affair it was a regrettable attempt at an extra-judicial solution to a claim fairly heard and dismissed by a learned and respected court. It looked at the time as a heavy-handed move to reopen a case so that a different result could be forced upon an unwilling Egypt.

After some time the Egyptian and United States Governments agreed to settle the matter by arbitration[48],and three arbitrators were appointed:Abdel Hamid Badawi Pasha,from Egypt;Fred K Nielsen from the United States;and Dr.Walter Simons as Presiding Umpire.The arbitration was held in Vienna, and lasted from the 20th.November to the 22nd.December 1931.

The United States listed several complaints.The main ones were that the Egyptian authorities ' caused severe moral and material damage to the American citizen George Salem by illegal and partial treatment and by excessive delay in juridical proceedings'.Ten points were then listed,which it is convenient to deal with in turn.

First,the United States accused the Parquet of forging the signature of Goubran Salem on his deposition denying that any transfer of land had taken place.This was an astonishing claim, unsupported by evidence,and against the theme of all the

circumstances.Secondly,the Egyptian Government was accused of illegally helping the Persian consul to arrest and prosecute Salem.As Salem's family had been under Persian consular protection,and as the American consul himself had denied at least three times that Salem was an American citizen,the Egyptian authorities were in fact bound by custom,usage and treaty to assist consuls in their dealings with their nationals and protegées.In any event,it was the Egyptian Native Courts that had prosecuted Salem for forgery after charges had been laid by the Persian consul,not the latter who had been cited in the American complaints.

Thirdly it was alleged that Salem was a well known and respectable person who should not have been arrested;that there was insufficient evidence,that the Ministry of Justice official who was asked to authenticate the transfer signature was not registered as an expert,and the expert's opinion was incorrect even if he was duly qualified.Fourthly,the United States held the Egyptian Minister of Justice liable for having a system of law that allowed investigation by the Juge d'Instruction and the Parquet.This was another astonishing claim.The system of investigation was,or ought to have been,well known as usual in Civil Law countries,and its inclusion in the Egyptian legal system was certainly not 'beneath the standard of international law' as the United States alleged.

The fifth and sixth claims concerned delays and adjournments, and the seventh complained about the retention of the documents relating to the transfer.These were in fact sent to the American consular authorities once agreement had been reached on Salem's American citizenship.The eighthpoint accused the Cairo District Court of rejecting Salem's claim on 'obviously false grounds'.It is hard to see either why the grounds for dismissal were false or why if false they were obviously so[49].

The next accusation concerned the comments of the Substitut in the Mixed Court of Appeal,and while it is clear that these comments were made there is nothing to suggest that the bench paid any attention to them at all.

Finally,the Mixed Court of Appeal was accused of pronouncing on the merits of the case instead of simply deciding admissability,and of dismissing the action because of 'obviously insufficient and false arguments'[50].

These were serious allegations and a damaging set of accusations for the United States to make,both publicly and with diplomatic pressure,against the Egyptian Government and the Mixed Courts.To these must be added the alleged breaches of treaty.

The supposed breaches were of the 1830 Treaty between Turkey and the United States,in that Egypt should have respected the rights of American citizens.It was suggested that even though Salem had lost United States diplomatic protection for a long time,he was nevertheless under continuous American jurisdiction for criminal matters.This was a completely erroneous statement.The Native Penal Code[51]was quite clear that everyone was within the jurisdiction of the Native Courts for criminal matters unless allowed consular jurisdiction by treaty.The American consul had denied that Salem was registered as an American at the relevant time[52]and thus following Salem's own denial of Persian nationality[53]he must have been subject to the Native Courts in accordance with the law.

The denials as to citizenship by the American consul hardly permit the United States to later argue that it should have had jurisdiction.The American consular facilities had been expressly denied to Salem,and he was treated as a direct consequence as an Egyptian subject.Throughout this whole affair the main problem centred on the United States' reluctance to treat Salem as American at the crucial times. The later forceful approach against the Mixed Courts is entirely inconsistent with the approach of the American authorities towards Salem over the previous years.It was also inconsistent with the position of the Egyptian legal system as an independent part of the Egyptian state,and it showed a lack of understanding both of the concept of the independence of the Egyptian judiciary,and of the final responsibility for judicial decisions.This is all the more surprising given that the Mixed Courts had had American judges since 1875,and there

should have been a greater awareness in the United States of the true position of the courts.

It is also relevant to consider Salem's nationality in the light of the Mixed Court jurisprudence which,in the absence of similar cases in the Native Courts,was certainly accepted so far as nationality was concerned by all Egyptian courts. As has been discussed[54]the Mixed Courts viewed nationality as more than just the possession of a certificate.It was felt that a certificate of nationality was only prima facie proof and could be fully investigated.Given this view, together with the reluctance of the American consul or the United States Government to renew Salem's passport either at all or for anything more than short periods,and Salem's own statements in several proceedings that he was Egyptian, there was no reason for the Native Courts to believe he was anything but Egyptian.Once,however,his American nationality was put to the Egyptian Government by the United States Government it must be emphasised that the case against Salem was closed and the American consular authorities took over the investigation.

The Egyptian Government relied broadly on two defences. First,that the United States Government had no locus standi, and secondly,if admitting a locus standi,that the claim was inadmissable because the Mixed Courts were the correct forum for disputes between the Egyptian Government and foreigners.

During the course of the arbitration it was conceded that the United States could pursue its claim,but the second defence was vigorously held.After long and detailed arguments the arbitrators came to a decision on the 23rd. December 1931,and this was published in Berlin on June 5th.1932.The award was a clear rejection of the United States' claim in its entirety.Dr.Walter Simons and Abdel Hamid Badawi were agreed that the American accusations were without foundation.The American appointed arbitrator, Fred K Nielsen,did not agree with his fellow arbitrators, and a dissenting award was published which basically

reiterated the United States' view.

Egypt and the Mixed Courts regarded the decision as a complete vindication of their conduct[55].The award laid great stress on the original denials by the American authorities that Salem was an American citizen.The points raised by the United States were dealt with in turn,and the tribunal made it clear that while disapproving of the Substitut's comments in the Mixed Court of Appeal it was hardly unexpected that the Substitut should accuse Salem of being a forger,especially as Salem had himself accused the Parquet and the Substitut's colleagues of forgery.In any event,the tribunal decided that the comments had had no effect on the bench.

As to the Mixed Court of Appeal judgement itself,the tribunal felt that it may not have been as well considered as possible, but that it did not form a denial of justice as recognised by international law.The type of action giving rise to political claims was something far beyond the facts of the Salem case,and the United States was wrong in seeking to extend the scope of political claims for judicial decisions.

Finally,the Egyptian Government itself was found not to be responsible for the actions of the Mixed Courts.The consent of the Capitulatory Powers was required for any changes in the Courts,and the framework within which they operated was such as to relieve the Egyptian Government of responsibility,although the courts were Egyptian courts giving justice in the name of the King of Egypt.

The award clearly supports the Mixed Courts.It found the organisation and working of the system to be as efficient and effective as necessary,and it bolstered the confidence of those who felt that the Mixed Courts were under an ill-informed external attack from a Power previously felt to be in sympathy with them.

The Salem case hearkened back to the disorganised system in Egypt before 1875.It resembled the dictation to Egypt of terms beneficial only to a foreign Power,and called into question on the international stage the competence and impartiality of the Mixed Courts.The United States Government

with scant regard for the effect on the reputation of the Mixed Courts,pushed its ill considered views of the case in such a manner that the Egyptian Government was forced to agree to arbitration as the only politically acceptable alternative to continued diplomatic pressure.The result and terms of the award showed clearly that the United States was wrong,and the international standing of the Mixed Courts did not suffer.This was just as well for many reasons,not least that an award which found against the Mixed Courts would have seriously hampered,if not delayed,the reforms to be agreed at Montreux in 1937.The Capitulatory Powers would have found it difficult to agree to either the extension of the Mixed Courts' jurisdiction over all criminal matters concerning foreigners,or the eventual merger of the Mixed Courts themselves into a unified National Court system if an international tribunal had found that the allegations of the United States were valid.

The Salem case also prompted the Egyptian nationalists to demand an early end to the remaining Capitulatory privileges so that there could be no question again of Egypt being in breach of what were now regarded as a series of onerous and one-sided treaties.To that end,the Salem case acted as a spur for nationalist demands for both reform of the Mixed Courts and abolition of the remaining consular jurisdiction, and can be seen as another landmark in the history of the Egyptian courts.

The Salem result may in addition be considered as the consequence of a spirited defence of Egyptian law and procedure by the Government in partnership with the Mixed Courts.An attack on the latter was felt as an attack on Egypt,and the power and influence of the United States was balanced against the need to preserve the integrity and reputation of the Mixed Courts.

The Mixed Courts and Internal Conflict of Laws.

Many problems continued to arise in relation to a choice of law for a case where parties were of a different nationality and questions of personal status needed an answer.The Mixed Courts were not,of course,personal status courts[56],but often had to decide which court or which law was correct.In this way they became a true court of conflicts,with a widespread respect for their decisions.

One of the most famous cases concerned the immense fortune of Count Habib Sakakini.The question to be decided was which court should authorise distribution of the estate?The answer made a considerable difference to one Henry Sakakini,who was adopted by Count Sakakini and was probably his natural son. If he was able to prove his rights as lawful son and heir he would have been able to inherit the bulk of the Sakakini fortune.

The Greek Catholic Patriarchal Court,the relevant religious personal status court,decided against Henry Sakakini.He therefore sued in the Mixed Courts for a declaration that this decision was wrong.The Mixed Court of Appeal was faced with several problems.Some of the claimants were French subjects and Roman Catholic,and thus not within the jurisdiction of the Greek Catholic Patriarchate.Others though were local subjects of the Greek Catholic congregation.Which courts were competent? Clearly,the Patriarchal Court only had jurisdiction if all the parties were of the same community,so some other court had to be found when the Patriarchal Court was not competent. It could not be the Mixed Courts because of the Mixed Civil Code[57],and thus the Mixed Court of Appeal[58]decided that the relevant courts for situations such as these were the Moslem religious courts(the Sharia courts).In this way the local Sharia courts were treated as the common courts of Egypt for use when other personal status traditions failed to produce an answer.

The Moslem principle that non-Moslems could be judged in personal status matters by their own courts was satisfactory

until there was a conflict of personal status courts,and it was a clear recognition by the Mixed Courts of the residual authority of the Moslem courts for personal status matters in Egypt.The decision thus provided guidelines that were essential for similar disputes[59].

In 1927,in the case of Dessouki Moustafa v A.Petroff[60] the Mixed Courts held themselves not competent in a dispute over the succession of a Russian subject who had died at Mansourah in 1912[61],and stated that the local court which had already heard the case should be allowed to continue with it. Which law should the local court use?This question was answered by the Gregorian affair[62] in 1928.The Mixed Court felt that there was no doubt that the national law of Russia should be followed[63].The fact that a local Moslem court was now thought appropriate as a forum in the circumstances did not mean a move to Moslem law.The traditional principle that a non-Moslem could be judged by his own law was not changed because there were no longer recognised Russian consular,and therefore personal status,courts.

Another view was put forward by the Mixed Court of Appeal when the religion of the parties coincided with the religion of a local community.Thus it was suggested that the local Orthodox Patriarchal Court could have jurisdiction over Orthodox Russian subjects.In one case[64] this was done with the consent of the heirs,and the idea certainly had an appeal for those Christians in dispute over personal status matters who did not feel content at having a Moslem court decide questions of that nature.This view was not universally held,however, although parties did use the procedure indicated when all the heirs were agreed.In other cases the dispute was sent to the Sharia courts and enforcement was carried out by the Native Courts and not the Mixed Courts[65].It remained the case that whenever Russian law was applied it was the law of old Russia, that is the Imperial law,and not the rules enacted by the USSR[66].

No outstanding contribution to jurisprudence arose out of these problems.The Mixed Courts continued to approach personal status

questions with reluctance,and in fact appeared more unwilling to hear them than before,although incidental questions of personal status were still decided freely.The movement towards having cases decided by Patriarchal courts of similar religions was a wise one,and the transfer of other cases to the Sharia courts was a cooperative recognition of an improvement in another branch of Egyptian judicial process.It was,as mentioned above,very much the view that the Sharia courts were the appropriate and residual personal status courts in a basically Moslem country when other systems failed to encompass disputes[67].

So far as this area was concerned in the overall history of the Mixed Courts it can be said that the necessity of understanding personal status matters also contributed to the increasing fund of judicial knowledge,and was a source of valuable material to all lawyers in Egypt.The need for cooperation and mutual respect between the various branches of the Egyptian legal system also fostered good relations and augured well for the future,although at the time the eventual merger of the Native and Mixed Courts was no more than an idea that was frequently canvassed amongst reformers.

The Mixed Courts and Companies.

Disputes over the nationality of corporations ensured that the Mixed Courts continued to deal with the residence and character of companies between 1926 and 1937.

The first case of the period concerned the Alexandria Tramways[68].This was a large,powerful,and well-known company and the question for the court to decide was whether the company was Belgian or Egyptian.There was in fact little doubt that it was Belgian.The headquarters was in Belgium,it had been incorporated in Brussels,expressly including Belgian law in its internal operation,it held all general meetings in Brussels,all senior management was in Brussels and the company paid Belgian taxes.Against that of course was the fact that the tramways and most of the staff were in Egypt.Nevertheless, it was held that the company was Belgian[69],thus maintaining the approach of the courts that management and control determined a company's nationality and not mere incorporation.

This principle was exemplified by the Manufacturers' Life case.The Manufacturers' Life Insurance Company,an English registered company,was sued by another English registered company,and claimed that the Mixed Courts had no jurisdiction because both companies were English and thus the appropriate forum was the British Consular court.It was held[70]that Manufacturers' Life was Egyptian.The <u>siege social</u> was in Egypt,and only an agency was in England.All the company's business was done in Egypt,and for all these reasons it was held to be Egyptian despite the English registration and the lack of an Egyptian firman of authorisation.

These decisions were entirely in accord with precedent,and continued the established tradition of seeking the real character of a company,that is the substance of its activities, rather than simply looking at the form.

In 1936 the Mixed Court of Appeal had to consider the status of the Credit Agricole d'Egypte,which was the largest mortgage company in Egypt.The company claimed that the correct forum

was the Native Court because the plaintiff and the company were Egyptian.The plaintiff claimed that the Mixed Courts had jurisdiction because of the theory of mixed interest, and the Mixed Court of Appeal,in a consolidated action, agreed[71].The company had argued that the mixed interest theory was inappropriate to private companies,but this claim was clearly against a long line of authority and was not accepted.The company also claimed that it was a public utility and therefore outside the jurisdiction of the courts.This claim was also dismissed,and the Mixed Court of Appeal went on to say that the application of a theory of mixed interest, apart from being in accord with precedent,was in fact the correct interpretation of the design for the Mixed Courts.

The Mixed Courts were for hearing mixed cases,and it was necessary to seek these out in the appropriate circumstances[72]. This theory was,however,beginning to come under sustained attack,and although it was continued by the Mixed Courts serious thought began to be applied to its reform[73].

Later the same year it was decided[74]that there was no mixed interest when the company was not in fact mixed,but only had a foreigner as a notional partner.This was a self-imposed reduction in the scope of mixed interest,and was in tune with changing views.It did not herald any great lessening of the Mixed Court jurisdiction,but it did show a newly restrictive approach.In the event,the theory of mixed interest was radically changed by the Montreux Convention(see later)and only one other case on mixed interest and companies is worth mentioning.

In 1937 the Mixed Court of Appeal decided a case concerning a Sudanese company[75].The judgement is interesting because it relied on two English cases[76],and showed a willingness on the part of the courts,even at this stage in their development,to go outside the Civil Law system for matters already well covered by their own jurisprudence.It also exemplified a desire to investigate which characterised the approach of the Mixed Court judiciary.

Finally on the subject of companies the Mixed Court decided that the Ural Cossacks Trade Board,founded in 1918,was a juridical person[77].The Board was not incorporated in the usual way,and was not a recognised state entity.Nevertheless,it was held that the juridical personality of the Board could not be denied,and that therefore it should be treated as a legal person in the usual way.As a consequence it could sue and be sued in its own name.This was a logical decision.The fact that de jure recognition had not been given to the USSR did not prevent Soviet companies and organisations from trading in and with Egypt.It would have led to unnecessary procedural difficulties if these organisations were not accorded some formal legal recognition,and the judgement treated the matter in a sensible and practical way.

Taxation.

The years 1926 to 1937 saw a radical improvement in the taxation system in Egypt,not only for foreigners but for all residents of the country.In the 1920s the only universal direct tax was on property,whereas by the end of the 1930s a regulated and comprehensive tax system was in force to increase government revenue and provide a base on which to plan future expansion of the economy and infrastructure.

A case that showed that foreigners were still challenging the property tax was heard in 1928[78].The taxpayer alleged that the tax was unfair.The Mixed Court of Appeal was very clear in its dismissal of that claim.To be challenged successfully in the courts a tax had to be arbitrary and unfair. This was not only in form but in substance,so that if a tax was supposed to be collected from both foreigners and natives but was in fact only collected from foreigners,it was thus unfair.So too in the situation where natives were allowed to evade or avoid the tax with ease whilst foreigners were not. The same principles applied when rules,by design or not, favoured the native taxpayer over the foreigner.

This was an extension,albeit logical,of previous analysis, but it again laid great store by the spirit and not just the letter of the law.If a tax had a fair form but an unfair application in practice the Mixed Courts would not enforce its collection.In fact in this case the tax was viewed as quite acceptable,and the court ordered its payment.The judgement went on to say that a fiscal expert could be appointed to investigate alleged inequality of taxation,but only if the Government's explanations were insufficient to satisfy the court.Experts would not be asked to report on every occasion.

In 1937 the Mixed Court of Appeal took the opportunity to state that tax laws should be interpreted strictly,and in favour of the taxpayer.It was said that the taxpayer was only bound to pay taxes according to the law,and in the case of a tax on the frontage of houses on a road it was held[79]that

houses not actually facing a road need not pay a frontage tax. As more and more taxes began to be introduced this principle was very important.It allowed the taxpayer the benefit of the doubt,and ensured that any tax legislation was neatly drafted.

Taxes were also held to be operative only when properly enacted. The Egyptian Government sought to impose a road tax on vehicles by means of a Note of the Minister of Communications which was approved by the Council of Ministers.It was held that this was an improper way to levy taxes,and the tax could not be collected in that form[80].The same taxpayer appealed against another tax imposed on their autobuses in both Alexandria and Damanhour,claiming that this was a double taxation of the same object.It was held[81]that neither tax was arbitrary and unfair and therefore neither was illegal.So long as a multiplicity of tax was not forbidden in the circumstances of such cases the Municipalities in which the company operated its transport business were each entitled to charge taxes[82].

The Treaty of Alliance and Friendship with Great Britain.

In 1936,after many years of negotiation between Egypt and Great Britain,a treaty was signed in London[83]setting out the future plans of both countries for Egypt.Part of the Treaty pledged Britain's support to Egypt to end the Capitulatory Regime[84],and another part provided that immunities and privileges in jurisdictional and fiscal matters for British forces in Egypt were to be arranged as a separate convention[85].The Treaty was stated to be between equals[86],and Egypt and Great Britain committed themselves not to pursue policies inconsistent with the Alliance,and to consult each other if in dispute with other governments[87].

If there was 'imminent menace' or 'an apprehended international emergency' Egypt agreed to provide facilities for Great Britain[88],and it was agreed that the British Military Occupation was ended[89],although Britain was allowed to station 10,000 troops and 400 pilots and air personnel to protect the Suez Canal[90].

The Condominium over Sudan was to be continued until further agreement had taken place[91],and it was also agreed that the European police force should be disbanded and replaced by Egyptian police.At the same time all foreigners were to be the responsibility of the Egyptian Government and not of Great Britain[92].

This Treaty heralded a fundamental change for Egypt.Free from Turkish sovereignty in 1914,and the Protectorate some years after,the British Military Occupation was now at an end,and Great Britain had agreed to help Egypt to reform the last vestiges of the Capitulatory Regime.By this time the Mixed Courts,with a preponderance of foreigners as judges,were seen by nationalists as derogating from Egypt's sovereignty,and moves accelerated to reform these courts,although this was seen as Egypt reaching judicial maturity,whereas the abolition of the Consular jurisdiction was seen as Egypt freeing herself from unwelcome and unwarranted shackles.The Treaty of Alliance with Great Britain paved the way for the Montreux Convention,

the last international agreement on an Egyptian judicial system which,after the indefinite extension given to the Mixed Courts in the 1920s,was to fix their life at only another 12 years.

The Montreux Convention.

On January the 16th.1937 the Egyptian Government issued an invitation to the foreign governments with interests in Egypt for a convention to be held at Montreux later that year.On February 3rd.the Egyptian Government sent the same governments its well prepared proposals for the abolition of the Capitulations and the reform and merger of the Mixed Courts.

It must be noted that although this conference was to deal with both the Capitulations and the Mixed Courts,the latter were not dependant on the former for their existence.However, as one of the attractions of the Mixed Courts was that they could take over consular jurisdiction for crime,if not also for personal status matters,it was convenient and necessary to deal with both Capitulations and the Mixed Courts at the same time and place.

In March 1937 the Egyptian Parliament gave Nahas Pasha,the Prime Minister[93],authority to go ahead with judicial reform,and the Convention was called for the 12th.of April.

The precise details of the Convention are clear but lengthy. The main aim was to abolish the Consular courts and reform the Mixed Courts,so that after a period of years the latter would be closed and their functions transferred to new National Courts.The old Native Courts were also to be closed.Although there had been pressure for reform before the 1930s,none of the proposals had seemed likely to succeed.In 1937 however the political situation had completely changed.Great Britain was now not the only Power keen on reform.Italy pledged her support

and many of the smaller Powers did likewise.France,so reluctant to assist the Judicial Reform of 1875 was now equally reluctant to see that Reform transformed,but France's influence in Egypt was comparatively insignificant by then as only one Power amongst many,and French objections were ignored[94].

The transitional period was fixed at 12 years.This was something of a shock for the Mixed Courts,whose participants suddenly realised that the institution which they had relied on for so long was now faced with a time limit of short duration in a historical context.The final date was fixed at the 14th. October 1949,after which date all Mixed Court work would be taken over by the new National Courts,a blend of the old Native and Mixed Courts.

Careful plans for amalgamation of the two systems were made, but all foreign judges were expected to retire in 1949,and members of the Mixed Court Bar were only acceptable as members of the new National Bar if they were sufficiently competent in written and spoken Arabic,but nearly half of them were not.

The jurisprudence of the Mixed Courts was seen as vital for the new system,and so plans were set in motion for the translation of cases into Arabic,so that a constant fund of precedent was available in the language of most Egyptians. Indeed,the plan for reform that Egypt put forward was so detailed and well thought out that the Capitulatory Powers had little option but to agree with all the points to be discussed,whether to do with translation or not,and only minor amendments were made.The inclusion of translation plans did of course show that Egypt was serious in desiring a gradual transition,and the respect given by Egypt to the work of the Mixed Courts since 1875 made for a restrained and amicable atmosphere.

Many of the foreign delegates had worked in the Mixed Courts[95], and thus had some practical experience to call upon.So too had some of the Egyptian delegation,and the main work for the Egyptian side had been completed by Abdul Hamid Bedawi[96],a well

respected lawyer whose ideas had received British support.

A revised Reglement d'Organisation Judiciaire was appended to the Convention papers,and this provided for several important changes.There was no requirement for a majority of foreign judges in any given Mixed Court,although an overall majority of foreigners was continued,with vacancies in the District Courts to be filled only by Egyptian nationals[97].The operative part of judgements was to be pronounced in Arabic and one other judicial language,and the entire judgement was to be translated from the language used into Arabic[98].

The Egyptian Government also realised its ambition of reducing the number of 'foreigners' who claimed to be within the jurisdiction of the Mixed Courts.The word 'foreigner' was agreed as only covering those nationals of the High Contracting Parties to the Convention,with the addition of other states as decreed by Egypt[99].This agreement thus restricted any further extension of the term 'foreigner',and was one of the more important provisions so far as the Egyptian Government was concerned.It will be remembered that the Mixed Court of Appeal in plenary session had already given a restrictive declaration on the definition of foreigners for ex-Ottomans,but this new agreement went much further and applied to all foreigners. Personal status matters could be heard by the Mixed Courts[100], but in practice most Capitulatory Powers reserved their right to continue consular jurisdiction for personal status questions. There were also provisions relating to mixed interest,bankrupts, movable and immovable property,and all these basically followed the trend in Mixed Court jurisprudence and thought, although the only important provision was the one on mixed interest,which was also more restrictive.The other matters were simply a question of tidying up the codes,and were not noteworthy.

The most radical new provision,however,was the new power of the Mixed Courts to hear all foreign criminal cases[101].This required a new Mixed Penal Code more in keeping with the 1930s, and new Codes were drawn up for the Native and Mixed Criminal

Courts based on the 1904 Native Penal Code with amendments.The final drafting was done by Sir Arthur Booth,the last English Judicial Adviser,Abdul Hamid Badawi,and Sabri Abu Alam Pasha, and at this swift move into a reformed Mixed Court system the extensive and hitherto preserved privileges of foreigners were destroyed.The Mixed Courts,which had until 1937 exercised only minor criminal authority where Contraventions were concerned, were now faced with being the only criminal courts for foreigners,using codes that most judges were completely unfamiliar with.It is to the credit of the Mixed Court judiciary that the foreign communities quickly became reconciled to having criminal cases before the Mixed Courts,and the new criminal jurisdiction led to what was probably the final series of landmark decisions in their history,that of the criminal immunity of foreign armed forces in Egypt,dealt with in the next chapter.

Montreux was a sudden and traumatic development in the evolution of the Mixed Courts.In its turn,however,it ensured that the traditions and jurisprudence of the courts,together with the learned research and publications of its lawyers and judges, were not merely used by way of analogy or example by the National Courts but as a truly essential part of the available precedent. The Mixed Courts were not simply abolished at Montreux,as the consular courts had been.The former were no longer considered necessary for Egypt and its relations with foreigners who had commercial or personal interests in Egypt,and it is fundamental to the future significance of the Mixed Courts' influence that they were merged into a new system.Montreux had shown the way for an amicable compromise;the Mixed Courts responded by continuing to do their best in the time left to expand further the patterns of Egyptian jurisprudence.

General Jurisprudence.

The events described in the previous pages of this chapter almost overshadowed the general work of the Mixed Courts in other and less striking fields.Nevertheless,a wide variety of issues continued to be heard,and none more than trade-mark and patent disputes.No startlingly new decisions were made,but it was held in 1926[102] that anyone who alleged that he held a patent was under a strict duty to prove the allegation,because a patent was protection for the subject matter against the whole world,and much more enduring than a simple trademark. It was also held that an idea could not be registered and protected[103],and sincere and effective use of a trade-mark had to be proved before any prior registration was allowed to afford protection against subsequent attempts to register[104].

In 1927 the Mixed Courts decided a claim for salvage brought by a Royal Navy Officer from H.M.S.Delhi against the owners of a Greek ship which had been rescued by the naval vessel. The claim was rejected,and the court held[105] that because the two ships were of a different nationality neither national law was applicable and therefore international rules would be considered for guidance.On the basis of the 1910 Brussels Convention the court decided that salvage fees were not payable to a man-of-war.There was no relevant Egyptian legislation on salvage fees,and this approach had the merit of using international principles rather than making a choice of one or other of the national laws.It also accorded with maritime practice in the Eastern Mediterranean.

A theory of compensation for personal injuries was also developing.The Mixed Courts continued to hold employers responsible for the injuries suffered by their employees,and were reluctant to allow the employers to allege that employees should have known better.If,however,the victim caused the accident himself the court was equally unwilling to allow him or his relatives to sue[106].In fact,relatives could only sue if they were dependants of the victim[107].

The extent to which injury was foreseeable was certainly judged in the context of Egypt.When a passenger was injured because of the general panic that ensued after a noisy electrical failure on the tramways it was held[108] that the carrier was responsible.It was its duty to maintain a supply of electricity and if that was not done it was definitely foreseeable that panic and therefore possibly injury would follow.

The general tone of similar judgements indicated that the monopoly of the tramway was significant enough to prompt a fairly strict approach to liability.It was nevertheless up to passengers who travelled on the foot-plates(a popular method of travel in Egypt)to look after themselves[109].

The question of a value for 'gold francs' continued to cause litigation.Despite earlier cases[110] litigants still sought the court's view on the correct unit for payment where 'francs' were mentioned.In line with precedent,each case was examined on its merits,although by and large all Egyptian companies were deemed to have agreed payments in Egypt at the Egyptian franc value of 3.8575 PT per franc.This was so whether the company's AGM had tried to decide otherwise or not[111].Such a view was strongly upheld in a later case concerning the Suez Canal Company,which was itself charging fees for using the Suez Canal in gold francs,when the Company tried to pay its creditors in the equivalent of French paper francs[112].

Attempts were also still made to oust the jurisdiction of the Mixed Courts by contractual terms.Such clauses were held to be void both because of the overriding requirement of ordre publique and because the laws setting up the Mixed Courts were based on international treaties which should be respected[113].The point was not really in doubt,but the judgement served to remind potential litigants that the Mixed Courts had defined jurisdiction which could not be excluded by contract.

Finally,it was held in 1937 that a judgement of the Danish Consular court could be enforced by attaching the seal of the Mixed Courts[114].The judgement stated that consular jurisdiction was legally the delegated jurisdiction of the Egyptian sovereign

who had agreed to allow his authority to be exercised by the consular judges of certain states over their nationals.Thus the Mixed Courts,sitting in the name of the Egyptian King, were able to enforce the judgements resulting from his delegated authority.This was a practical view to take, although its relevance was shortlived because of the imminent closure of the consular courts.It is interesting though as an example of how the Mixed Court judiciary saw the legal basis of consular jurisdiction.To regard it as delegated was in keeping with the concept of mutual agreements based on usage. The other broad interpretation,that consular jurisdiction was imposed on a weak Egypt,did not fit in with the facts or the law,and would have caused practical difficulties of enforcement on reluctant parties.This latter interpretation was the one that the politics of nationalism used,however,and the finer points of legal theory surrounding consular legal authority made no impact on the movement opposed to this 'foreign' power within Egypt.

A View from Other Courts.

It was discussed in the last chapter that courts in other countries often had occasion to refer to the Mixed Courts. A further example of this in Sudan, where the judge appeared to make up his mind on a mixture of English and Egyptian law, occurred in 1926[115]. The judges of the Anglo-Egyptian Condominium often drew on Egyptian law, and especially the Mixed law in commercial matters, and thus an indirect influence was felt. The Sudanese courts found the jurisprudence of the Mixed Courts helpful, and this shows the ready adaptability of the jurisprudence to other Moslem countries. After all, the law in the Mixed Courts was Egyptian law, and thus not obviously alien to Sudan.

In 1928 the English Court of Appeal heard an action concerning an English company controlled in Egypt[116]. Frequent mentions of the Mixed Courts were made, and the case is useful in that it not only describes the procedure for mortgages and their registration in the Mixed Courts, but also exemplifies the type of land company which was registered in England but working exclusively in Egypt.

Another case at the same time showed a remarkable similarity to cases concerning the nationality of companies in Egypt. Although the question was one of nationality in Egypt and residence or domicile in England, similar reasoning as to central management and control was employed[117].

Finally, it is worth noting that the Italian Court of Cassation was content to accept as correct evidence which the Mixed Courts had allowed as admissible and sufficient to form a conclusion upon[118]. The appellant in Italy had alleged that the facts had not been properly proven in the Egyptian case, but the Italian court said that it was prepared to accept the findings of the Mixed Court and would not reexamine the evidence. Although it was a different litigation, the facts were the same.

The above cases serve to show in a small way the kind of recognition afforded to the Mixed Courts by other judicial systems outside Egypt.

Notes to Chapter 8.

1.August 26th.1936.Discussions for a treaty had been started between Zaghloul Pasha and Ramsay MacDonald in 1924 and continued with Sarwat Pasha and Sir Austen Chamberlain in 1928,Mohamed Mahmoud Pasha and Arthur Henderson in 1929 and Nahas Pasha and Arthur Henderson in 1930.These all foundered for one reason or another,but details were eventually worked out and negotiations culminated in the 1936 treaty.The draft treaties between Egypt and Great Britain were published as follows:1928-HMSO Cmnd.3050;1929 -HMSO Cmnd.3376;1930-HMSO Cmnd.3575.

2.See Chapter 3 notes 24 & 25;Chapter 4 note 16;Chapter 6 n.31.

3.Art.1 NPC.

4.This Order in Council had to be amended by another Order in Council of 23.7.1937,making the starting date for Palestinian citizenship 6.8.1924 so that there was no gap between the Treaty of Lausanne(loss of Ottoman citizenship) and the commencement date of the Order in Council(granting Palestinian citizenship).

5.MCA 4.5.1926 GTM XVIII n.12.

6.Mansourah District Court 7.12.1926 GTM XVIII p.16.

7.Contrast this with the case above at note 5.

8.A similar decision for foreign status had been made in a case concerning the Ottoman Tobacco Co.It was held that the Company was Turkish and as Turkey was a foreign country the Mixed Courts had jurisdiction:Régie Ottoman des Tabacs Co. Ltd. v Prince Aziz Hassan,Summary Tribunal Cairo 16.8.1925 Pres.Preston GTM XVI p.119.The same result occured in Dame Edma ve.N Saikaly v Dame Jeanne ve.N Saikaly,Commercial Tribunal Mansourah 15.12.1925 Pres.de Wee GTM XVI p.119 when Palestinians(and Syrians and Lebanese)were accorded foreign status for judicial purposes,but in the Cairo Referee Court 30.10.1925 Pres.Houriet ex-Ottomans were treated as local subjects and not within Mixed Court jurisdiction.

9.Antoine Bey Sabbagh v Mohamed Pacha Ahmed & others,Mansourah District Court 15.11.1927 Pres.Rennetta GTM XVIII p.13.

10.Egyptian Government v Mohamed Bey Saadi MCA(P) 2.5.1929 GTM XXI p.87,from the second Chamber MCA 10.1.1929.

11.This was a question causing frequent litigation and had been referred by the first Chamber MCA 12.12.1928.For convenience the three questions were discussed together.
12.The case of Hoirs de feu Georges Loutfallah Sursock v Georges Khayat MCA(P) 3.5.1929 was also determined at the same time.
13.Damianos v Egyptian Government MCA 21.6.1927 GTM XVII p.253;also Egyptian Government v Abdul Latif Abdallah MCA 1.5.1928 GTM XVIII p.178.
14.Hoirs Yurgevitch v Egyptian Government MCA 22.4.1930 BLJ XLII p.430.
15.In MCA 12.5.1925 GTM XV p.158 the grandson of a Jew born in the Papal States who was himself registered in Egypt as an Austrian protegé was held to be Italian.The court made it clear that if the executive authorities of the state could not agree on a person's nationality it was up to the Mixed Courts to do so.The previous month the case of Pini v Pini MCA 28.4.1925 GTM XV p.161 decided that the descendant of a Venetian sailor,resident in Egypt,was Italian.The operative fact was Venice's inclusion into the Kingdom of Italy in 1866 after rule by Napoleon,then Austria and then a status as the Cisalpine Republic,rule by Italy and again by Austria.When Venice was recognised as part of Italy by the Treaty of Vienna in 1866 the right to Italian nationality became a primary right and could be exercised by a descendant.
16.Elialou Ibrahim Wahba v Mahmoud El Ibiasi,Cairo District Court 29.1.36 GTM XXVII p.277 where registration was declared not to be a legal method of acquiring nationality but simply proof of declaration.Also Boubez v Dame Edma Sabbagh Bey MCA 17.2.1932 where there was a conflict between Egyptian and Spanish certificates.It was held to be a question for the Mixed Courts to decide.
17.Naggiar v Michel Ibrahim Taubgui MCA 4.2.1936 GTM XXVI p.174,referring to Art.14 Egyptian Law of Nationality 1929.
18.Hamed Mohamed Abou Zeid v Soliman Mohamed,MCA 17.3.1937 GTM XXVII p.273.
19.Nazla Levy v Abdel Razak & others,Summary Tribunal Cairo 31.3.1937 GTM XXVII p.278.The plaintiff first claimed French nationality because she had been married to a French protect-

ed Tunisian.On proof of divorce from the Tunisian she claimed Italian nationality.The Italian consul gave evidence that she had not followed the proper procedure to recover her nationality,but the Mixed court held that,for judicial purposes in Egypt,she was Italian.

20.The negotiations included those leading up to the Mixed Courts in 1875.

21.Decree 20.5.1891,and Decree 30.5.1894.The change involved £1.4M of new capital at 4% interest per annum.

22.Cairo District Court 15.6.1925 Pres.Giraud GTM XV p.193.

23.MCA 29.4.1926 Pres.Vaux GTM XVI p.261.

24.0.464%of the reparations was paid over,see O'Rourke,op. cit.p.89.

25.Zaki Bey Gabra v RE Moore,Referee Judge Cairo 14.2.1927 J.Gautero GTM XVII p.104.An earlier decision had held that French Government supervision of the banking interests of the Caisse National d'Epargne Francais was not sufficient to create sovereign immunity:Alex.District Court 29.11.1924 see Chapter 7 note 40.

26.MCA 1.3.1927 Pres.Baviera GTM XVII p.257.

27.Cairo District Court 24.11.1924 Pres.Giraud.

28.MCA 1.3.1927 Pres.Baviera XVII p.257:'Mais attendu que du moment où il s'agit d'un véritable acte de souveraineté, tel que celui d'autoriser les forces de S.M.Britanique,qui occupaient déjà depuis longtemps le pays,d'exercer tout droit de guerre dans les ports et territoire égyptiens,les Tribunaux n'ont aucune juridiction pour statuer sur cette mesure dans laquelle on ne saurait voir un excès de pouvoir, mais simplement l'exercice de ce même pouvoir,qui échappe au contrôle judiciaire'.

29.Law no.25 1923.

30.Egyptian Government v British India Steam Navigation Co. MCA 11.5.1927 Pres.Hansson GTM XVII p.247:'le trafic des armes,quelque légitime et licite qu'il puisse être en soi,ne pouvant avoir lieu qu'aux risques et périls de ceux qui s'y prêtent'.Also Politis & Coombs v Customs Administration,The Katina,MCA 16.2.1929 where it was held that arrest of a ship by The Emir Farouk,an Egyptian Government vessel,was an act of sovereignty whether it was outside the Customs zone or not.

No claim for damages was allowed,and the seizure was upheld. See also Grunberg v Customs Administration,9.2.1931 GTM XXII p.341.

31.National Navigation Co.of Egypt v Tavoularidis & Co., Referee Judge Alex. 9.11.1927 J.Quale GTM XIX p.251.This followed the general view of the time as to de facto and de jure recognition,see e.g. O'Connell,International Law,2nd. ed.,Stevens & Sons,London,1970.In USSR Trade Representative in Turkey v Levant Red Sea Coal Co.,Maurice Benin & Co.,Alex. District Court 20.3.1933 Pres.Vlachos GTM XXIV p.67,it was held that the Representative could sue in the Mixed Courts. The fact that its government was not recognised de jure did not prevent it exercising private rights.Thus the Mixed Court view was straightforward.The Soviet Government's agents were not diplomats or otherwise privileged.They were merely citizens representing a foreign power.The Soviet Government itself could not exercise its alleged sovereignty(e.g.by suing as a Government)in a positive manner because that would entail recognition of Soviet Russia de jure by the courts when the Egyptian Government had declined to do so. Allowing a defence of sovereignty was,however,a simple recognition of the de facto situation,and not inconsistent with a refusal to recognise de jure.

32.Monopole des Tabacs de Turquie v Régie co-interéssie des tabacs de Turquie,MCA 22.1.1930 BLJ XLII p.214.Contrast with note 8 above.

33.Fresina v Egyptian Government,Cairo District Court 14.4. 1931 GTM XXII p.353.

34.Protopapas v Minister of Finance & Interior,Cairo District Court 21.12.1931 GTM XXII p.351.

35.Nader v Marconi Radio Telegraph Co.of Egypt,Alex.District Court 12.3.1934 GTM XXV p.32,and Mansourah District Court Elias & Abdou Noujaim v Eastern Telegraph Co.,1934,upholding the Port Said Summary Tribunal.

36.Together with the provisions of the 1926 Convention,e.g. Art.3.

37.Art.91,1926 Convention.

38.Art.13,ibid.It was argued that this meant that private companies were themselves liable,but the court disagreed.

39.Dame Galila Basiouni Amrane v Col.ES John,Alex.District Court 14.1.1932 Pres.Jonkheer van Asch van Wyck GTM XXIV p.108.
40.By virtue of Art.37 of the Dette agreement,28.11.1904.
41.deLacroix & Negrotto Cambiasco v Egyptian Government, MCA 15.2.1936(reversing Cairo District Court 21.1.1933) Pres.van Ackere GTM XXVI p.121(detailed report 121-147).
42.See Chapter 5 note 19.
43.Under S.2 of an American Act of 2.3.1907 that presumed voluntary expatriation and loss of citizenship after a protracted absence abroad.
44.Letter from the American authorities to the Egyptian Government:'I have the honour to inform your Excellency that Mr.Salem owing to his protracted residence in Egypt and his inability to present satisfactory evidence to overcome presumption of expatriation under the Act of March 2,1907, is not now registered at this Agency as an American citizen, or entitled to the protection of the United States'.This was almost a repeat of a letter of 9.7.1913.
45.Inheritance was a question of personal status and thus treated as within consular jurisdiction for foreigners;the law of the consul determined the distribution of the estate and whether fees were chargeable or not.
46.Cairo District Court 3.3.1924.After this decision the Americans started intense diplomatic pressure,but the Egyptian Minister of Foreign Affairs,Ziwer Pasha,wrote: 'Ainsi que je l'ai exposé a Votre Excellence,les Tribunaux Mixtes,établis à la suite des Conventions diplomatiques avec les Puissances Capitulaires,ont pleine juridiction pour examiner les litiges entre les étrangers,sujets de ces Puissances,et le Gouvernement Egyptien et pour allouer les dommages-intérêts lorsqu'un préjudice réel a été causé aux particuliers par les actes des agents de l'administration locale.Si donc la demande du Sieur Salem repose sur une base légale et s'il arrive à prouver par devant la Cour d'Appel Mixte,actuellement saisie du procès,qu'effectivement il a subi le préjudice dont il se plaint,des dommages-intérets équitables lui seront alloués.Le Gouvernement s'inclinera comme il le fait toujours,devant la décision de la Cour à qui doit être laissé le soin de juger ce procès,comme tous

les autres de la même nature qui lui sont journellement soumis'.
47.MCA 22.4.1926.
48.Protocol of 20.1.1931.
49.The Cairo District Court actually allowed Salem considerable leeway in the timing of hearings and presenting evidence.
50.Significant parts of the judgement are as follows:'Attendu qu'il est constant et avéré par Salem qu'il se prévalait tantôt d'une prétendue nationalité persane,tantôt de son état de sujet ottoman et que pendant l'année 1917 et l'année 1918 il acceptait sans protestation la situation d'un sujet local; que cela est si vrai que,non seulement la Légation des Etats-Unis d'Amérique a déclaré dans une lettre du 15 Décembre 1917 que Georges Salem avait perdu sa nationalité américaine, mais dans le susdit acte d'arrangement intervenu le 7 Novembre 1917 entre Georges Salem et les autres intéressés à la succession de Goubran Salem,il est déclaré que cet arrangement se fait 'sans égard à la nationalité américaine, persane ou égyptienne'de Georges Salem';and after reviewing the facts:'Attendu,en définitive,et en vue des circonstances non contestées de la cause,que Georges Salem est irrecevable à réclamer quoi que ce soit au Gouvernement Egyptien;que si cependant à la rigueur,l'action,en tant qu'elle vise une indemnité pour un prétendu préjudice,est ou pourrait être considérée recevable dans la forme,il suffit pourtant de parcourir l'acte introductif d'instance et les conclusions des parties,avec les pièces versées de part et d'autre,pour s'assurer que cette action est dénuée de toute base sérieuse'.
51.Art.1 NPC.
52.e.g.letter of 20.12.1916 from the American Agent to the Governor of Cairo,see note 44 above.
53.Salem wrote to the Judicial Adviser,Sir Maurice Amos, 17.8.1918,stating that his father and uncle had fraudulently bought Persian protection for LE40 each.This point seems to have been overlooked by the American Government.
54.See Chapter 7 p. 198,and above p.228.
55.The Award & Dissenting Opinion is reproduced in Salem Claim,United States Printing Office,Washington,1933.
56.Art.4,MCC.

57.Ibid.
58.Sakakini v Sakakini,MCA 9.2.1926 Pres.Baviera GTM XVI no.188;Livre d'Or,op.cit.,p.169a.Contrast Jacques Herzenstein v Procureur-General of the Native Courts,MCA 15.12.1926 GTM XVIII no.14,where for civil matters,other than personal status,concerning foreigners the Mixed Courts were held to be the appropriate courts as they were Egyptian territorial courts.It was also held that the Mixed Courts were the appropriate courts for conflict problems.It is on this latter point that the decision may be taken as correct.
59.In a later case,Charvet v Yazdikian GTM XIX no.4,the Mixed Court of Appeal also held the Patriarchal court to be incompetent,and transferred the case to the Moslem Sharia courts.
60.MCA 10.2.1927 Pres.Vaux GTM XVIII p.35.
61.'...il est manifeste cependant que la juridiction mixte qui n'a aucune compétence en matière de succession ne saurait se substituer au juge du statut personnel pour faire une déclaration dans un sens ou dans l'autre...'
62.Gregorian v Gregorian,MCA 1928 Pres.Messina GTM XIX no.8.See also Gregorian v Gregorian 29.5.1929 Alex.District Court.
63.'Si les défendeurs,tout en n'ayant pas renoncé à leur nationalité et à leur religion,croient pouvoir le prétendre pour une simple question d'argent,on ne peut pas admettre en voie de principe que les Russes en Égypte ne soient plus régis dans leurs rapports strictement personnels et familiaux par les préceptes que le génie,les croyances et les besoins de leur race leur ont donnés;mais soient soumis à des règles qu'une autre race a élaborées,les déduisant de croyances religieuses qui ne sont pas les leurs et les adaptant à des institutions sociales que la loi de l'Islam a profondément empreint dans son esprit!.
64.National Bank of Egypt v Novakoff,MCA Pres. Vaux GTM XVI no.191.
65.Dr.Ardaches B Garabedian v Miss Henriette Sanglard & others,Referee Court Cairo 11.9.1928 Pres.de Wee GTM XIX p.12.

66.Dame Sophie Ichlenedjian & others v Gregorian(Boghos Sarkis),MCA 10.3.1931 Pres.McBarnet GTM XXIV p.71.
67.The Mixed Courts also decided incidental questions of Moslem law themselves,especially in relation to Wakf property,see articles by Goadby,JCL Vol.16,1934 p.40 et seq. and JCL Vol.14,1932 p.222 et seq.
68.Alexandria Tramways Co. v D Theodoraki & others & Pierre Cordahi,MCA 19.2.1927 BLJ XXXIX p.253.
69.Following City & Agricultural Lands v Rodocanachi,15.1. 1915.See Chapter 6,p.170 for another example.
70.Alex.Commercial Court 9.5.1933 GTM XXIII p.306.
71.Credit Agricole d'Egypte v Wadih Hermes,Credit Agricole d'Egypte v Ahmed Saad,MCA 27.5.1936 Pres.Brinton GTM XXVI p.222.
72.See also Joseph Manofla v Credit Agricole d'Egypte,Cairo Commercial Court 2.4.1935 Pres.de Wee GTM XXVI p.222.
73.The Native Courts were gaining in experience all the time, and less reluctance was felt about allowing them to hear cases.
74.Oscar Angelil & Co. v Boutros Ibrahim,Alex.Commercial Court 30.11.1936 Pres.Villela GTM XXX p.58.
75.Contomichalis,Darke & Co.Ltd. v Elly Drossos,MCA 3.3.1937 GTM XXVIII p.49.
76.Continental Tyre & Rubber Co.Ltd. v Daimler Co.Ltd. 1916 AC 307;The Polzeath [1916] P.117,241.These cases were regarded as equally applicable to Egyptian situations where questions of company nationality arose,even though they were not strictly on that point.
77.Dahan & Dorra Bros. v Paul Tchoureff,MCA 24.6.1936 Pres. Brinton GTM XXIX p.102.
78.Egyptian Government v Nicolas Zintzos,MCA 3.5.1928 Pres. Vaux GTM XVIII p.176.
79.Tantah Municipality v Aly Hussein El Sallamy,MCA 14.1. 1937 Pres.van Ackere GTM XXIX p.312.
80.Soc.des Autobus de Damanhour v Egyptian Government,MCA 29.4.1937 Pres.van Ackere GTM XXIX p.310.Council of Ministers approval 21.7.1932.
81.Soc.des Autobus de Damanhour v Municipality of Damanhour, Alex.District Court 29.12.1937 Pres.Mohamed bey Said GTM XXIX p.310.

82.It may be noted with reference to the later section on Montreux that this case was one of the first major ones to consider the effect of the Montreux Convention,in particular Art.2.
83.26.8.1936,ratified 22.12.1936.This became Law no.80 of 1936 in Egypt.See also note 1 above.
84.Art.13 Treaty.The clause appeared to give Egypt the unilateral right to end the Capitulatory regime,but this right was not exercised.The article also promised that a rule of non-discrimination against foreigners would be followed.
85.Art.9 ibid.This provision was to be of unforeseen importance in the war years 1939-1945.The separate convention was actually signed at the same time as the main treaty.British officers attached to the Egyptian Government as part of the Military Mission were accorded semi-diplomatic status which involved freedom from tax.
86.Art.4 Treaty of Alliance.
87.Art.5 & Art.6 ibid.
88.Art.7 ibid.
89.Art.1 ibid.
90.Art.8 ibid.
91.Art.11 ibid.
92.Art.12 ibid.
93.Nahas Pasha was also a member of the Mixed Court Bar.
94.The countries represented at Montreux were:South Africa, United States of America,Australia,Belgium,United Kingdom, Denmark,Egypt,Spain,France,Greece,India,Irish Free State, Italy,Norway,New Zealand,Holland,Portugal and Sweden.
95.e.g.Maitres Wathelet,Messina,Boeg,Linant de Bellefonds, Vryakos.
96.Head of the Egyptian Government's litigation service,and Egyptian arbitrator in the Salem case,see p.246.Bedawi later became a judge at the International Court of Justice.
97.Art.2 & Art.3 Revised Regulations.
98.Art.12 ibid.
99.Art.25 ibid.Austria,Germany,Hungary,Poland,Rumania, Yugoslavia,Czechslovakia and Switzerland were added,and notice was formally taken of the problem of White Russians.Egyptian nationals could no longer claim foreign protection.See Chapter 9 note 18.

100.Arts.27.28,29 Revised Regulations.
101.Arts.44-50 ibid.
102.MCA 8.12.1926 BLJ XXXIX p.60.
103.MCA 6.4.1927 BLJ XXXIX p.366.
104.MCA 13.6.1928 BLJ XL p.424.
105.Crichton v Samos Navigation Co.& others,Port Said District Court,July 1927 ADPIL Vol.3 1925-26 Case 1.
106.The Sinai Mining Co.Ltd. v Dame Katifa bint Mahmoud Hassioui,MCA 13.1.1927 Pres.Vaux GTM XVIII p.323.
107.MCA February 1927 Pres.Vaux(Hoirs Mahmoud Kaneil & Greffier en Chef de la Cour d'Appel Mixte v Egyptian Delta Light Railways,GTM XVIII p.232).
108.Georges Kandalaft v Cairo Tramways MCA 23.2.1928 Pres. Vaux GTM XVIII p.229.
109.Alexandria & Ramleh Railways Co.Ltd. v Spiro Sclavounous MCA 19.5.1928 Pres.Vaux GTM XVIII p.231.
110.See Chapter 7 p.213.
111.MCA 21.6.1928 BLJ XL p.459.
112.J Shallam & Sons & others v Suez Canal Co.,MCA 18.6.1931 Pres.Vaux.After stating that the Company was legally Egyptian the Mixed Court of Appeal said:'a priori le franc de son titre serait le franc or,seul connu en Egypte à l'époque seul invariable et fixe et le seul qui puisse être actuellement envisagé...pour toutes les sociétés anonymes se fondant en Egypte,ou sous l'empire des lois égyptiennes,depuis l'avènement de la Reforme'.
113.Kyriazi & Co. v Egyptian Government,MCA 30.11.1933 GTM XXIV p.12.
114.Patrice de Zogheb v Isabella de Zogheb née Scelsi & others,MCA 18.3.1937 GTM XXIX p.77;most decisions of foreign consuls were enforced without undue difficulty.
115.Ninia bint Saleh v Mohamed Bey Labib el Shahid 1926 SLR 1 p.284,referring inter alia to Art.442 MCC,concerning the assignment of a claim for unliquidated damages to the wife of a bankrupt.It was held that the assignment might be discharged by payment of the purchase price and any relevant costs.This accorded with Egyptian law.It will be remembered that the Mixed Courts were not directly involved in Sudan because of the Anglo-Egyptian Agreement.

116.Butler(HM Inspector of Taxes) v The Mortgage Co.of Egypt Ltd.(1928) 13 Tax Cases 803.
117.Todd v Egyptian Delta Land & Investment Co.Ltd. [1928] 1 KB 152,HL.There had been several English cases on companies in Egypt:Alexandria Water Co.Ltd. v Musgrove(1883)11 QBD 174,CA;The Egyptian Hotels Ltd. v Mitchell [1914] 3 KB 118, HL;Wilcock v Pinto & Co. [1924] 1 KB 304.
118.Fahmy v Pances 2.3.1936 Italian Court of Cassation, Guirisprudenza It.88(1936) I (1)p.270;see ADPIL vol.8, 1935-36 p.288 Case 124.

CHAPTER NINE

1937 TO 1949.

Introduction.

In many ways the years from 1937 to the closing of the courts in 1949 were twilight years.The end of the Mixed Courts had been proposed and agreed,and it was just a matter of time before the Reform of 1875 was eclipsed by a new National Court system. Despite the impending closure the work of the courts continued, and this chapter starts with a discussion on The Broad Effect of the Montreux Convention on the Mixed Courts,followed by a look at the continuing topic of The Mixed Courts and Government Immunity.The next section is on Taxation,which had been radically reorganised in the 1930s,leading to the most important subject in these last years,The Mixed Courts and the Jurisdictional Immunity of Foreign Armed Forces in Egypt.The section describes the civil and criminal liability of the foreign armed forces in Egypt,and details the arguments and leading cases.This series of judgements from the Mixed Courts is one of their most important contributions to the international law field.

The chapter concludes with a brief view of General Jurisprudence, a section on The Closing of the Mixed Courts,and notes.The strands of Mixed Court jurisprudence are drawn together in the Conclusion, where the effect,if any,on modern Egyptian legal thought is examined.

The Broad Effect of the Montreux Convention on the Mixed Courts.

In essence the 1937 Montreux Convention made foreigners in Egypt subject to Egyptian law without restrictions.Although the Mixed Courts had pursued a policy of strict interpretation when foreigners had sought the protection of treaties against Egyptian laws and regulations,the changing political climate ensured that all restraints on the right of Egypt to legislate for all foreigners in the country were abolished as from October 15th. 1937[1].The Egyptian Government declared that it did not seek to discriminate against foreigners,and expanded on this declaration in a subsequent Protocol[2].Any disputes under the Convention which were not settled by diplomacy were to be referred to the Permanent Court of International Justice[3].

A new Penal Code was applied to both Native and Mixed Courts[4], and a new Code of Criminal Procedure was also enacted[5].All other laws in force on October 15th. 1937 were expressly stated to be applicable in the Mixed Courts[6],but a long list of laws specifically repealed was published by the Egyptian Government, including all laws with a Capitulatory connection[7],so that the laws in force on October 15th. were only those applicable to Egypt's new status of complete legislative freedom.So far as the Mixed Codes themselves were concerned Articles 1-12 of the Mixed Civil Code were repealed,and the relevant provisions were covered by the Revised Judicial Rules[8].Thus the Mixed Courts continued with their codes largely unaffected in form, but with several major restrictions contained in the Revised Judicial Rules,also referred to as Revised Regulations.

The theory of a mixed interest,at one stage a vital element in the working of the Mixed Courts,had turned into an unpopular concept.It was therefore provided that disputes would be heard in the Mixed Courts on the basis of nationality only,and not on the grounds of a mixed interest[9].The exceptions to this were where existing Egyptian companies had 'des intérêts étrangers sérieux'[10],or where a foreign creditor was a party to bankruptcy proceedings in the Native Courts[11],and where a foreigner had a charge over immoveable property[12].A subsidiary action could not,however,be brought in the Mixed Courts if

the principal action was in the Native Courts,unless the latter remitted the case[13].An assignment of rights to a foreigner during proceedings in the Native Courts was presumed to be an agreement made solely to transfer the case to the Mixed Courts, and was thus invalid for that purpose.In exceptional circumstances the Native Courts could admit evidence to the contrary,and an assignment by way of the indorsement of a negotiable instrument was not invalid for a transfer of the case unless it was an irregular indorsement or simply an indorsement for collection only[14].

Actions begun before October 15th. 1937 in the Mixed Courts remained there even though a similar action after that date would have been within the Native Courts' jurisdiction[15].A further article however restricted the Mixed Courts' competence in matters of sovereignty,and also prevented any judicial pronouncement on the validity for foreigners of Egyptian laws and regulations[16].

So far as personal status was concerned the Mixed Courts were spared the difficulty of hearing a multitude of personal status disputes because all countries,except Portugal,exercised their right to maintain consular courts for personal status matters[17]. The result was that the consular courts in Egypt after October 1937 were only continued for personal status litigation[18]. Although little such work was in fact to arise in the Mixed Courts a new set of rules was enacted to add to the existing Codes[19].The applicable law was the national law[20],and if the person concerned held more than one nationality it was up to the Mixed Court to decide which to apply,unless one of the nationalities was Egyptian,when the Court was bound to apply Egyptian law[21].

Despite the above changes the most important one for foreigners was that giving the Mixed Courts criminal jurisdiction over them.The old Mixed Penal Code was little use,and the new one was drafted for both Native and Mixed Courts[22].For the first time in Egypt all persons present in the country were subject to the same Egyptian criminal law,although a new procedural Code was enacted specifically for the Mixed Courts[23].

At the base of the Mixed Criminal Court system was the tribunal de simple police,which heard contraventions,and délits where the maximum penalty was less than three months imprisonment and/ or a fine of LE 10[24].A tribunal correctionnel of three judges heard délits not within the scope of the tribunal de simple police,and also appeals from that latter court[25].The Cour d'Assises,comprised of five judges,including at least three judges from the Mixed Court of Appeal,dealt with crimes[26].The final criminal appeal court was a Cour de Cassation,composed of judges from the Mixed Court of Appeal,excluding those who had taken part in the judgement appealed[27].

The criminal jurisdiction of the Mixed Courts was to lead to the most important series of decisions in the years 1937 to 1949,concerning foreign armed forces and their immunity from criminal actions,which are dealt with later.The abolition of consular jurisdiction over crimes by foreigners was an event feared by many non-Egyptians,and the transfer,albeit on a temporary basis,of criminal offences by members of the foreign community to theMixed Courts facilitated their eventual absorption in the new National Courts in 1949.

A further burden placed on the Mixed Courts was the task of reviewing overseas requests for the extradition of foreigners in Egypt.In fact the 2nd.World War placed most matters of this kind in the hands of the military authorities,but in 1937 extradition involving foreigners within the jurisdiction of the Mixed Courts was made a question for them,and was not left to an executive decision of the Government[28].

Finally,the Règlement for the Native Courts was altered to bring expressly within those courts all persons not granted the right to be heard in the Mixed Courts[29].This was actually little more than had already been taken as the better view of the Mixed Court judiciary,except for the question of a mixed interest,and although the above provisions were all seen as reducing the influence of the Mixed Courts over civil and commercial matters the 2nd.World War overshadowed all litigation and gave,as has already been mentioned,the last opportunity to the Mixed Courts to make an authoratative and talented contri-

bution to Egyptian legal thought.It may be incidentally noted that the Mixed Courts were still permitted to use natural law and equity to decide a case if the existing law was thought insufficient[30].

How did the Mixed Courts respond to the new order?In 1939 it was held[31] that clauses in a contract choosing a jurisdiction other than the Mixed Courts for disputes between foreigners were no longer automatically void as being against public policy because circumstances had changed so that the Mixed Courts were no longer the sole forum for what were 'mixed' disputes.If parties chose another forum it was not for the Mixed Courts to intervene.This was a definite change in attitude;a few years beforehand the Mixed Courts were swift to seize the opportunity to confirm their sole competence to hear all mixed cases.In line,however,with the fact that the law was changed so that foreigners were not obliged to have their disputes decided in the Mixed Courts but could, if they so wished,do so[32],the Mixed Courts were no longer prepared to insist on being the only correct forum for mixed disputes.

So far as criminal matters were concerned the Mixed Courts regarded the change in the laws as clear and valid.In the case of Ministère Public v Ibrahim el Moussabeh a French subject[33] claimed that as France had not yet ratified the Montreux Convention the jurisdiction of the Mixed Courts in criminal matters could not cover French subjects.This claim was rejected.Mindful of the prohibition against questioning the validity of Egyptian laws in relation to foreigners[34],the court said that the law clearly stated 'les Tribunaux Mixtes connaissent de toute poursuite contre un étranger pour un fait punissable par le loi'[35].As the Revised Regulations were contained within an Egyptian law[36] the Mixed Courts had to accept their provisions as binding,regardless of whether the terms of an international treaty had been complied with or not.Clearly,countries were not to be allowed to avoid the jurisdiction of the Mixed Courts over their nationals,especially as the consular courts had been abolished,simply by not depositing the formal act of ratification.

The Montreux Convention itself provided that it would not affect states until it had been ratified by them[37],but the court held that the essential matter was that an Egyptian law had been passed giving the Mixed Courts jurisdiction.This was quite contrary to earlier views when the 1875 Judicial Reform was seen as securely based on treaties which could not be overruled by internal laws.Although this new view was not in strict accordance with the Convention it was in accordance with the laws that Egypt had passed in reliance on the Convention, and in the spirit of legislative freedom for Egypt the Mixed Courts were unwilling to pronounce against the new order, especially when to do so would be to defeat the purpose of the 1937 reforms[38].

In a later case on the same point,Dominguès Caitano Rodrigues v Ministère Public[39],it was again held that an internal Egyptian law was preferable to an international treaty,especially in view of the prohibition against pronouncing on the validity of Egyptian law as it affected foreigners.Clearly,it was thought neither legally justifiable nor necessary in the interests of justice to prefer the negative terms of a treaty to the positive approach of the new laws.

What were the Mixed Courts to do when faced with a person who was previously within the jurisdiction of the Native Courts? In Ministère Public v Ephtimios Nicolas Hadjidimios & Dimitri Panta Velycovitch[40] it was held that Yugoslavs previously within the jurisdiction of the Native Courts were in the future within the competence of the Mixed Courts because of the Montreux Convention[41],unless the charges related to offences already before the Native Courts.In the circumstances this was a suitable practical decision.

The consequence of these changes was to update much of the practice of the Mixed Courts,and by the addition of full criminal jurisdiction to place them on an equal footing,so far as variety was concerned,with the Native Courts.The Montreux Convention paved the way for the closing and merger of the Mixed Courts,and thus steered them from 1937 towards eventual abolition in 1949.Despite the finality of this date the work of the courts continued as usual,with standards and dedication maintained.

The Mixed Courts and Government Immunity.

The years 1937 to 1949 did not see many notable actions involving Government immunity,except in so far as the debate on foreign armed forces was concerned.The topic of foreign armed forces and their immunity from suit is dealt with later in a separate section and the other,non-military,cases were few.

One such case concerned a claim for damages by the owner of the Brasserie-Restaurant Giovannidi following a riot in Alexandria on August 15th. 1930[42].The restaurant owners alleged that damage done to their premises was due to the fault of certain police officers who,wounded from the fighting,sought refuge in the restaurant,thus 'provoking' the crowd to attack the building.As a result of the widespread damage done in Alexandria a Commission was established to hear claims for compensation,and 333 were submitted for consideration,including one from the plaintiffs.331 of those submitted were settled without dispute by an assessment of the Commissioners,but the plaintiffs rejected an award of LE 20 made to them for the damage to the Giovannidi as 'derisory,mean and offensive'.

On August 8th.1933 the owners sued the Egyptian Government in the Alexandria District Court for LE 920·70 PT as damages,and this claim was dismissed on May 21st. 1935.An appeal was rejected by the Mixed Court of Appeal who,apart from holding that the cause of damage was insufficiently clear to decide the involvement of the police,and disapproving of the evidence of witnesses of such an event almost eight years afterwards,used reasoning entirely consistent with earlier cases in describing the Government's responsibility,and such reasoning was,in the circumstances,quite appropriate[43].It was considered that the theory of a government's ultimate responsibility was an important factor in placing the Government's obligation for internal security on a basis away from complete immunity.The essence of the Mixed Court's reasoning was that difficult as the task was, the Egyptian Government had held itself out to be the force of law and order and,if it failed to be so due to a clear fault on the part of its servants or agents,a claim for damages could be made.In fact,it was the normal practice in Egypt to establish

Commissions after civil disturbances to assess claims for damages, as had occured in the Xanthakis case,but the Mixed Courts were nevertheless present as a final arbiter should the need have arisen.However,the 2nd.World War reduced the scope for supervision of claims of this nature because of the numerous tribunals and commissions set up independently of the Mixed Courts to deal with wartime matters.Despite this the principle of ultimate Government responsibility had become established,and highlighted the awareness of Egypt's residents as to their rights in such circumstances,especially in the absence of any administrative courts or specific laws covering riot damage.If the Government failed to provide compensation for civil disturbance damage it was up to the Mixed Courts to provide it.Although a Council of State was set up in 1946 to take jurisdiction over cases involving the public domain(as against the private domain)and to hear disputes over public servitudes,it was only after the closure of the Mixed Courts in 1949 that a proper system of separate tribunals on Civil Law lines was established.

In 1942 the Palestine State Railways Administration claimed sovereign immunity in relation to an order to pay,jointly with the Egyptian Government,LE 100 damages for an accident for which the Palestine Railways were responsible.The Mixed Courts held that no immunity would be granted because,in accord with precedent,the applicable principle was that a state which entered into the private law field by administering a railway for the carriage of passengers and freight could not claim that it was engaged in an actus imperium,but it was instead involved in a commercial contract for which it was liable in the usual way[44].The Mixed Court of Appeal,having dealt with the plea to the jurisdiction on immunity grounds declared that it had jurisdiction on a territorial basis because the contract was partly performed in Egypt,and held that the Palestine Railways were unable to avoid their obligation to pay damages,despite being a wholly owned department of the Palestine Government.

Also in 1942 the Mixed Court of Appeal held that Customs Regulations could not be challenged by an importer of goods because the enactment and enforcement of the Regulations was an act of state[45].The Egyptian Government had given three months notice on July 17th. 1935 for a change in the duty on

Japanese goods,as required under an agreement with Japan.A Decree[46] increased the duty on cotton and silk from Japan before the expiration of the three month period and the importer Brandt, who had ordered his goods before the notice was given, and who might have reasonably expected them to have arrived before the end of the three month period and thus avoid the extra duty,sued the Customs Administration.He claimed that the notice to change duty could not expire until a full three months had passed,and could not be abrogated by the Decree.It was held at the District Court and in the Mixed Court of Appeal that his action could not be heard because the administration of the Customs and the raising or changing of tariffs was a sovereign matter for the Government.In addition,it will be remembered that the Mixed Courts were expressly forbidden from deciding the validity of Egyptian laws as they affected foreigners and this would have included the Decree raising Customs duties[47].

The final noteworthy case in this period on government immunity was Egyptian Delta Rice Mills v Comisaria General de Abastecimientas y Transportes de Madrid[48].The dispute arose out of a contract for the sale of 2,000 tons of rice,and money was owed by two Spanish companies,the defendants and the Federacion Ind. y Elaborades de Arroz de Espana,for 1,180 tons which had not been paid for.An order had been made on March 3rd. 1941 for the money to be paid,and although the facts were not in dispute the defendants claimed immunity on the grounds that they were an organism of state and thus free from suit.It was held that the transaction was an ordinary commercial deal and the defendants were unable to protect themselves with immunity.

The above cases continued to reflect the firm establishment of a principle of the separation of a state's sovereign and commercial acts.Although overshadowed by the important and controversial cases on foreign armed forces,the Egyptian Delta case and the others considered above provide a further link in the jurisprudence of the Mixed Courts,and the Egyptian Delta case especially confirms the theory as applicable to the Egyptian or a foreign sovereign,and in peacetime or wartime.Here again the real nature of the dispute and the circumstances of the case were of primary importance.

Taxation.

After many years of criticism of the way foreigners in Egypt attempted to avoid and evade taxation,the problems associated with foreigners and tax were completely solved by the Montreux Convention's legislative freedom for Egypt.Armed with the full right to legislate without restriction the Egyptian Government passed a new and uniform income tax law applicable to all persons resident or working in Egypt[49].In addition there were taxes on professions such as law,medicine and accountancy[50], together with a stamp tax and a draft inheritance tax.All of this regulated the fiscal position of foreigners,and took away from the Mixed Courts disputes involving a question of foreigners' obligations to pay taxes.However,the Mixed Courts were still occasionally called upon to decide whether new taxes were applicable or not,in particular circumstances.

In 1938 it was decided that a tax on alcohol sales was owed by the owner of the building in which the alcohol was sold,because it was in the nature of a real and not a personal tax[51].The main result of this argument was to facilitate the collection of taxes by the Municipality because if the person selling the alcohol could not be traced or was unwilling to pay,the owner of the building would be obliged to settle the amount due.The law was thus interpreted in a way that made enforcement simple.

Four years later the Mixed Courts were again called upon to interpret the laws relating to alcohol sales.The Cercle Syrien, one of the leading private members clubs in Alexandria,sued the Municipality of Alexandria for the return of money paid as tax on alcohol sales,and for a declaration that the alcohol tax was not applicable to organisations that sold drink to members at no profit to the organisation itself.In addition,the tax was alleged to be invalid because it had not been passed in the correct form.

It was a constant view of the Mixed Courts that the burden of proof was on the tax authorities to show their right to levy a tax[52],but this principle did not interfere with the collection of taxes shown to be properly demanded.It was a shield against taxation not duly sanctioned,but not a means to avoid tax altog-

ether by raising technical points.In the spirit of this approach the Alexandria District Court held[53] that the tax had been passed in conformity with the law,as the Council of Ministers had signified their approval in the manner set out in the relevant law[54].It was also held that the alcohol tax was payable regardless of whether a profit was made or not,because the tax was on the sale of the alcohol and not on the profit,if any,that resulted.The importance of the case was evident from the intervention of the three other leading clubs in Alexandria, the Mohamed Aly Club,the Cercle Suisse,and the Cercle Hellénique. All were concerned at the inroads such a tax was having on alcohol sales,and all sought to exploit the arguments presented by the Cercle Syrien.This judgement closed the opportunity to avoid alcohol tax and was clearly in keeping with the spirit and letter of the law.

The alcohol tax was passed under a form of delegated legislation allowing the Municipality to enact local regulations for certain taxes.One of these local taxes was a tax on motor-vehicles,all of which had to be properly licensed.In an effort to raise more revenue the Egyptian Government set in motion a series of taxes and charges for the use of agricultural roads and bridges by lorries,and also raised the licence fees for such vehicles. This was challenged by several lorry owners,and after lengthy preliminary arguments the case was heard by the Mixed Court of Appeal.

The lorry owners' case was uncomplicated.The taxes complained of were said to be illegal and improperly assessed,and therefore should have been repaid.The Government on the other hand defended its right to raise revenue,and also claimed that at least part of the taxes in dispute were in reality charges for the abnormal use of the public highway by commercial vehicles. The questions involved affected a substantial number of people, both directly and indirectly through the cumulative effect of these higher payments,and the decision was awaited with interest. The case was split into several elements,with judgements given at different times[55].

First,the Mixed Court of Appeal reiterated the view that all taxes had to derive from a specific law,whether directly,or

indirectly under a power granted by that law.This was in accordance with the traditional principles that no tax could be imposed or relieved except through the legislative process, and if a tax was levied without conforming to these principles the taxpayer concerned could seek repayment of the sums paid.

Secondly,there was no justification within the relevant regulations for an increase in road tax for lorries,nor did the law setting out the procedure for building agricultural roads provide for an extra charge on lorries[56].Indeed,this latter law provided that the Egyptian Government was responsible for the costs of building and maintaining the roads[57].Thirdly,the Egyptian Government was not justified in doubling the tolls for lorries at bridges as this was not allowed under the law, and fourthly the public had a right of way for their vehicles over public roads,even if the vehicles were heavy,so long as they obeyed the police and highway regulations in force.Therefore a charge for lorries over and above the usual tariff could only be seen as a tax on lorries,and as such a tax was not properly levied it was illegal and could not be enforced.

Fifthly,the court reiterated that any interpretation of tax legislation must be strict and the legislation itself must be examined to make certain that the tax had been correctly passed. Further,the court declared that payment of the taxes demanded, when the alternative was a refusal by the Government to grant the appropriate permit,was not a voluntary and free act which thus acted as an estoppel in a later claim for repayment. Consequently a taxpayer could not be taken to assent to a tax simply because he had paid it;there had to be an element of unqualified acceptance clear from the circumstances before the tax authorities were able to show that a later claim for repayment was barred on the grounds of prior acceptance. Presumably this argument could have been developed to allow a claim by a taxpayer who had previously agreed voluntarily to pay the tax if he was to discover a later valid reason for non-payment.The court then concluded the declaration with a statement that the law preventing repayment of taxes more than three years after payment[58] was not retrospective and could not be used by the Government to escape repayment in this series of claims.No implication of retrospectivity was assumed.

The Mixed Courts once again set the scene for the interpretation of tax in Egypt,and the new income and professional taxes could be interpreted in the light of these decisions.Two main factors are clear.One is that the Mixed Courts continued their tradition of recognising the right of the Government to levy tax,but only within the legislation available.The second is that the practice of looking at all the circumstances of the cases,and not just the specific laws relied upon,was continued so that the purpose behind the tax law in question could be seen in the context of the taxes complained of.This may broadly be described as a common-sense approach,and it was certainly generally viewed as fair and reasonable.

The final revenue case to be discussed in this period related to an assessment raised on a member of the British forces in Egypt.The 1936 Treaty of Alliance and Friendship between Great Britain and Egypt,together with a Convention,provided for various immunities for British forces in Egypt,including an exemption from taxation[59].Although the exemption did not cover charges for specific services rendered,especially certain municipal charges called taxes in the relevant local regulations, the benefits of such an otherwise broad exemption for members of the British forces were substantial.How far could these be extended?

The Fiscal Authorities followed the reasoning evident in the Convention attached to the 1936 Treaty.Taxes of a specific nature such as the road tax and licence fees were clearly not within the exemption,but nor were taxes deducted at source from bank and commercial interest,and from share dividends.In the view of the Authorities that sort of income was not within the contemplation of those drafting the immunity provisions.

Some members of the British forces were unhappy about this view,and the Mixed Courts were able to clarify the situation after a person serving in the forces sought exemption from taxes on his private affairs.The Mixed Court of Appeal[60] held that the immunity granted in 1936 only applied to the British camps and forces as a whole,together with individual members of the forces in their capacity as members,and not in their private affairs.Consequently,income arising outside the scope of employment by the military was taxable,whereas military pay

was not.This was a valuable decision which cleared away any misinterpretation of the Treaty provisions.As Egypt possessed a sophisticated economic and financial infrastructure there were many opportunities for those inclined and able to do so to invest or otherwise utilise their resources for profit.In addition,many of the local British community with business interests (which included those with United Kingdom origins as well as Maltese and Gibraltarians)had enrolled in the British forces, and it was essential for the Fiscal Authorities to have a firm legal guideline as to which taxes would apply.In the circumstances a view that membership of the British armed forces gave a complete fiscal immunity would have been illogical and highly unsatisfactory,and the Mixed Courts' guidelines were accepted and followed.

The Mixed Courts and the Jurisdictional Immunity of Foreign Armed Forces in Egypt.

This subject may be split into three.The first category deals with the rights of individuals in legal actions against a foreign state's armed forces that possessed no agreed immunity, the second with legal actions and members of forces with some agreed immunity,and the third category covers actions by the Egyptian state against individual members of forces without specially agreed immunity.In all events the section will not discuss hostile forces,but only friendly foreign armed forces. The responsibility for hostile forces in Egypt was a matter for the British High Command under the usual rules of war.

The first category presented no particular problems in Egypt during the 2nd.World War.If an individual sued a member of a foreign military force for something done in the course of his duty as a soldier,sailor or airman the Egyptian courts did not allow the action to proceed because the individual was suing an agent of a sovereign power on duty for that sovereign.It thus became a question of sovereign immunity,and posed no difficulty for the Mixed Courts given their wide and extensive jurisprudence in this area.If,on the other hand,an individual sued a member of a foreign armed force for a purely civil matter unconnected with sovereign powers the case could proceed because the defendant was sued in his private capacity,and not in his role as agent of a sovereign power.

So far as crimes were concerned only the second and third category involved such matters,and the first category was comparatively straightforward.An individual was simply subject to the usual rules of government immunity.This was a sensible approach in view of the practical position.Before the 2nd.World War the British were the only foreign armed forces in Egypt (apart from during the Ist.World War,and the occasional military mission).Until 1936 the Mixed Courts had granted immunity from suit to members of these forces on duty[61],and after 1936 the Anglo-Egyptian Treaty formally recognised a certain immunity, discussed below.The 2nd.World War brought military personnel from many other countries into Egypt,and the theory of applying the rules of government immunity for civil litigation was not

only thought appropriate but worked well.It was simply a question of extending the considerable precedent on government immunity to the actions of foreign government military servants.There were not in fact many cases in this category before the Mixed Courts but two exemplify the attitude taken.

In the first,a villa was leased to the head of the French Military Mission in Egypt.After the lease expired the Frenchman stayed,and refused to go,claiming that he was immune from suit as part of the Allied forces.The Mixed Court disagreed.It was held[62] that as there was no agreement between Egypt and the French Military Mission the ordinary principles of law were to be considered,and no immunity could be accepted for the renting of the villa in question on the facts given because it was a clear matter of a landlord suing a tenant,without any question of sovereignty arising.Thus a restrictive interpretation of civil immunity for foreign armed forces followed from the restrictive interpretation of sovereign immunity as the two were,for these purposes,seen as manifestations of the same thing.If a state acting as a private person was not immune from suit,there could be no reason for an employee of the state to be immune for his private business.

The second case showed how immunity could arise.It was granted to the Greek Government in an action by the victim of an accident involving a lorry belonging to the Royal Hellenic Air Force.It was held[63] that the Greek Government,in its operation of military transport,was acting in its capacity as a sovereign power and thus could not be sued.

The second category,legal actions against members of forces with some agreed immunity,covers both civil and criminal acts, and thus covers cases where the Egyptian state prosecuted individuals,and where individuals sued other individuals.

The most important immunity formally granted by the Egyptian Government was for the British armed forces[64],under the 1936 Treaty.The English text of Article 4 reads as follows:
'No member of the British forces shall be subject to the criminal jurisdiction of the courts of Egypt,nor to the civil jurisdiction of those courts in any matter arising out of his official duties.'
Unfortunately the French text reads differently:

'Aucun membre des forces brittaniques ne sera justiciable de la juridiction criminelle des tribunaux d'Egypte,ni de la juridiction civile de ces tribunaux,en aucune matière relevant de ces attributions officielles.'

It can be seen that the addition of a comma in the French version changes the meaning of the Article.The English version suggests that British forces had complete jurisdictional immunity for criminal offences,but only for civil matters if these arose from official duties.The French version,on the other hand, suggests that both criminal and civil acts enjoyed immunity only when connected with official duties.Both the English and French texts were authentic,and the Arabic version,also authentic, did not materially assist.Which version was correct?

The problem was resolved after the case of Ministère Public v Edward Alexander Spender[65] in 1938.Spender was a Civil Servant with the British forces in Egypt,and thus within whatever immunity they possessed.He had an argument with a certain Abdel Latif Ahmed on a train,which led to proceedings against Spender for damages for assault.Although there was no real doubt that an assault had taken place the Mixed Court of Appeal declined to give a definite answer as to the damages resulting from the criminal assault until the Procureur-Général,on the instructions of the Court,had taken up the matter with the Egyptian Government to ascertain the official view.The Government replied[66] that:"le membre de phrase 'in any matter arising out of his official duties' doît être consideré comme se rapportant uniquement à la juridiction civile".Consequently the Mixed Courts were not competent to hear the case against Spender[67],nor therefore to award damages as a result of the criminal case under the partie civile principle,because the immunity extended to all the legal consequences of his criminal act[68].

What was the legal position of deserters from the British armed forces?The situation was complicated by the problem that some defendants who were deserters had deserted before they arrived in Egypt,and others had done so during their posting there,and had stayed on after the unit to which they were attached had left.The Mixed Courts decided these cases by reconciling the terms and purpose of the 1936 Anglo-Egyptian Treaty with the rights and duties of military personnel in relation to their

own service units.

In 1944 it was decided that the jurisdictional immunity of the Anglo-Egyptian Treaty could only apply to British forces actually stationed in Egypt in compliance with the terms of the Treaty itself.Thus a certain Holder,a British national who had originally been in the Royal Air Force outside Egypt but who had deserted and had become a merchant seaman,was open to prosecution.He had been discharged from a merchant navy vessel in Egypt,and had joined the pool of seamen waiting for a ship.During his stay he was charged with the theft of a motor vehicle,and he had claimed immunity under Article 4 of the Treaty,but without disclosing his RAF background. This plea was rejected by the Tribunal Correctionnel and by the Cour de Cassation[69].On a retrial in the Tribunal Correctionnel Holder gave evidence that he had deserted from the RAF in 1938 and was still subject to the Air Force Act as a deserter.He therefore claimed immunity as part of the British armed forces, but this plea was dismissed on appeal[70].The immunity was held to apply only to those personnel actually stationed in Egypt. This view was shared in Pericleos v Ministère Public[71],where it was decided that so long as a British deserter's unit had been in Egypt,and he was still subject to military discipline, the Mixed Courts were unable to hear a prosecution against him because of the 1936 Treaty.The court said that Pericleos was subject to continuing military obligations,and could not voluntarily discharge himself from the British forces and so leave himself a civilian in terms of status.As he was still legally a member,albeit a defaulting one,of the British forces the court then went on to confirm that the Treaty applied to his unit,thus first reviewing the status of the deserter within his own unit and then confirming that that unit was part of the British forces entitled to immunity.As a result the Mixed Courts only heard cases against deserters from units in Egypt when the policy of the army was to discharge them[72].

This was an entirely logical approach because the Native and Mixed Courts shared complete criminal jurisdiction over infractions of the 1937 Penal Code[73],and it was only special agreements between Egypt and Great Britain that allowed the British forces the privilege of some immunity.It was of course understood

that the British authorities would themselves deal with offences by British military personnel as a breach of 'British' law,thus as either a breach of English law or military discipline[74],and the Egyptian authorities were confident that wrongdoers would not go unpunished.It was a question of the forum in which the defendants were to be tried rather than a concession allowing members of the British forces to commit crimes,because the jurisdictional immunity granted to the British forces was only a procedural one,whether for criminal or civil litigation. It is especially relevant that the Treaty did not provide that legal responsibility would be extinguished.There was a clear difference intended between the immunity from suit which was granted and the existing responsibility for the act.The result of this approach was made clear in a case where the Mixed Court of Appeal had no difficulty in enforcing a claim against an insurance company by the relative of a deceased killed by an insured member of the British forces[75].

In the action before the Alexandria District Court the driver's immunity as a member of the British forces was successfully pleaded by the insurance company.On appeal it was held that this was incorrect,and the decision was reversed.The Mixed Court of Appeal declared that jurisdictional immunity was no obstacle to an action brought to determine the civil liability of the underwriters of a policy covering the accident in question. The terms of the 1936 Treaty provided only a procedural bar in actions against the British forces and their members,and the effect was not to extinguish the right of the plaintiff or the liability of the defendant.Therefore it was permissible to hear a case against the insurance company as underwriters of the driver's liability,and if appropriate to award damages against them.

This was a valuable judgement.The Mixed Courts interpreted the jurisdictional immunity for exactly what it was,and there is nothing inconsistent in this decision and the Treaty.On the contrary,the purpose behind the Treaty was to avoid a clash between the rights of the Egyptian sovereign and those of the military acting on behalf of the British sovereign,and certainly not to allow a third party insurer to shelter behind the shield of a concession to the British forces.This is especially so as

the Egyptian Government clearly expected the British authorities to hear actions against British personnel wherever appropriate. Thus if the Mixed Courts had refused to hear the action it might have been possible to proceed against the driver in the British Consular Court in Egypt,but this would have been very unfamiliar ground for a plaintiff,and of doubtful validity so far as enforcement was concerned.The most practical move was to award damages against the underwriters.It may be noted that the problem of an underwriter who gave cover on terms and conditions assuming that immunity would be transferred was not dealt with;presumably the answer would have been the same because the court looked at the case from the standpoint of the Treaty and the plaintiff.

The final judgement in this category dealt with the simple case of a requisitioned villa.In June 1943 the Military Governor requisitioned a villa,and by an agreement with the British Admiralty,signed by a Royal Navy Captain,allowed the Admiralty to occupy it.The roof was later destroyed in a fire,causing LE 3,000 of damage,and the owner of the villa sued the Egyptian Government and the British Admiralty for this amount.The Admiralty refused to enter a formal appearance,and the British Foreign Office advised the Mixed Courts in writing that 'His Majesty's Government is not subject to the jurisdiction of the Courts in Egypt'.The owner thereupon applied for judgement in default against the Admiralty,but it was held that the Treaty of 1936 clearly applied to a member of the British forces acting on behalf of the British Admiralty,and the application was refused[76].The court also ordered that the Admiralty be removed from the action.This case serves as an example of precisely the sort of civil case that the Treaty was designed to cover, and there was no need for the court to examine the facts in relation to the precedent on government immunity because the Treaty was unambiguous.

An interesting point which does not appear to have been extensively discussed in the Mixed Courts is the status of persons not attached to the British forces but nevertheless committing offences within the boundaries of British military camps.These camps were at all times Egyptian territory,but under the exclusive control of the British Military Authority[77].It seems reasonable to suppose that the Egyptian courts should have dealt

with all persons not otherwise excluded from their jurisdiction, but would the British courts have had a right also to deal with these offenders?Although the question was not definitively answered the Mixed Courts suggested that the British authorities did have jurisdiction over offences committed in the British camps[78].Unfortunately,the argument was not developed far enough to ascertain whether such offences had to be in contravention of English,Egyptian,or military law.

The third category of actions-those by the Egyptian state against members of foreign armed forces without any agreed immunity-covers criminal prosecutions.It encompasses many interesting problems,and provides an almost unique insight into how a properly constituted court of law developed principles to deal with such wartime cases.This uniqueness stems from the situation of the Mixed Courts themselves.They still had jurisdiction over all foreigners accepted as such by the Montreux Convention and the Egyptian Declaration[79],and applied a Penal Code uniform to the Native and Mixed Courts.The Egyptian Government had given its voluntary consent to have foreign troops stationed on her territory as part of the war effort of her ally Great Britain,although Egypt herself had not declared war.There was heavy fighting in North Africa,the Suez Canal was a vital link between the constituent parts of the British Empire,and the Middle East Supply Centre was based in Egypt.The country was thus of immense strategic importance,but nevertheless was protected so far as her cities were concerned by barriers of desert in the geographical sense,and by a huge number of British and Allied forces in a military sense.Thus although Egypt was on a war footing,and everyday living was different from peacetime, quite apart from the air attacks on Alexandria and constant naval and army engagements,the Mixed Courts continued to work quite normally.This was apart,of course,from the reorganisation necessary to take account of the enemy nationalities represented on the Bench and in the foreign communities[80].

Unlike other countries where there were vast numbers of foreign troops,such as France in the Ist.World War,the Egyptian Civil Authorities maintained control over Egypt.The ordinary law remained in force,and the Mixed Courts could thus entertain in a meaningful way the type of problems that arose.The overwhelming

military presence in Egypt was British,and as Great Britain and Egypt were on firm and friendly terms the British forces could be called upon as an aid to the civil power in case of need.In the final analysis what the Mixed Courts decided in relation to foreign armed forces without agreed immunity was backed up by the Egyptian Government and its British ally.The decisions of the Mixed Courts thus had a real and practical meaning,and were not a series of empty and futile declarations.As a result the foreign forces before the courts had to take the procedure seriously,as any military power they possessed which they might have been tempted to use to resist a judgement of the Mixed Courts was ineffective compared to the power at the disposal of the Egyptian Government.

The Mixed Courts saw all this as a natural result of the fact that Egypt was still an integral sovereign state despite the war being fought over part of her territory,and the fact that she was a base for hostilities in the Mediterranean,Africa and the Middle East.It also reflected a view of the more fundamental issues involved.The Mixed Court judiciary saw the 2nd.World War as a battle against oppression and military dictatorship,and the Allied forces were fighting,in a legal sense,for the rule of law and natural justice and equity.It hardly then befitted the Mixed Courts to relinquish their jurisdiction over military personnel without good reason.Why should foreign troops in Egypt by consent of the Egyptian sovereign have any implied immunity from the ordinary law?

The counter-argument was that military forces needed complete legal freedom to operate efficiently.This was especially the view of American observers of the Mixed Court's jurisprudence in this area[81],but the reply to this point of view can be stated simply:the Mixed Courts avoided any hindrance of the foreign forces' military duty,and no judgement prevented the exercise of their proper military tasks.In addition,it must again be emphasised that the foreign armed forces were in Egypt with the consent of the Egyptian sovereign,and without any implied or express concessions as to jurisdictional immunity.Simply because consent had been given did not mean that immunity automatically followed.

Which forces were involved?The cases show that the vast majority

concerned the Greek forces,with some attention being paid to the French forces[82].The first noteworthy case was Ministère Public v Patsoulinis[83].A Greek sailor arrested on a criminal matter claimed immunity from prosecution as a member of the Allied forces,and the Mixed Courts asked the Egyptian Minister of Justice for an executive ruling on the status of the Greek forces in Egypt.The reply[84] was unambiguous:
'...bien que jouissant du privilège d'exterritorialité,les Forces Navales Helléniques ne beneficiaient pas des dispositions particulières soustryant les Forces de Sa Majesté Brittanique,en toute matière,à la juridiction des tribunaux de droit commun'. Thus the plea of immunity was rejected.

The next case was Ministère Public v Georges Triandafilou[85], where the defendant was charged with stabbing a policeman and possession of a dangerous weapon.Triandafilou was a Greek sailor from the Panthin,a Greek naval vessel in the port of Alexandria. He had been sent ashore on duty to arrange for provisions for the ship(with orders to return by midnight)and a certificate to this effect,signed by the captain of the ship,was placed before the court.At some stage in the evening in question he went into a bar in Mohamed Aly Square and began drinking,emerging drunk a few minutes before midnight.He noticed a crowd around a policeman who was dealing with another matter,and drew a dagger from his pocket and stabbed him.There was no connection at all between the incident that the policeman was dealing with and Triandafilou,nor between either incident and Triandafilou's official duties.He was quite simply a drunken sailor who had attacked an Egyptian policeman.

Triandafilou was arrested and brought before the Alexandria Tribunal Correctionnel.He at once claimed that the court had no jurisdiction because he was on duty at the time and thus protected by the principles of international law.This question of law was referred to the Chambre de Conseil,who ruled that the Mixed Courts did have jurisdiction and the Tribunal heard the case.

Various factors were dealt with in turn.First,the court recited the provisions of Article 44 of the Revised Regulations,granting the Mixed Courts jurisdiction over offences by foreigners.It would have to be an exception to this jurisdiction if Triandafilou's

plea were to succeed,and the court felt that none of the principles of international law referred to by the defendant were relevant.Triandafilou was not part of an army of occupation but in Egypt with the voluntary consent of the Egyptian sovereign.Further,the court referred to the letter from the Minister of Justice to the Mixed Courts in the Patsoulinis case[86],confirming that no jurisdictional immunity had been granted to the Greek forces,and declared that as Triandafilou was guilty of an ordinary crime unconnected with military duties, on Egyptian territory,he was within the jurisdiction of the Mixed Courts and liable to prosecution.The Tribunal Correctionnel found him guilty of stabbing the policeman in the back and sentenced him to eight months imprisonment.He was however found not guilty of carrying an offensive weapon,because the court held that his possession of the dagger could have been justified by his original status of being on duty,on service commandé,even though he was hors de service by the time of the stabbing.

Triandafilou,with the backing of the Greek authorities and community,appealed to the Cour de Cassation.The Greek community in Alexandria had always been loath to submit themselves to any Egyptian court,and this feeling manifested itself in relation to the Greek forces,so that considerable support was given to Triandafilou's contentions.The Cour de Cassation hearing,held several weeks later,discussed altogether more detailed concepts of international law than had the Tribunal Correctionnel.It was accepted that,in the absence of any formal arrangement between Egypt and Greece,the Mixed Courts had to formulate their own rules to define an approach in Egyptian law to such questions. The court therefore considered a wide range of authorities, including foreign writers on international law.

To start with,the status of foreign warships in Egyptian ports was considered.Without doubt,it was said,the immunity of the warship was not in issue because Triandafilou was arrested on shore.The question remained whether he could carry with him ashore the immunity,for these purposes assumed,of the warship. Finding a division amongst writers on this subject the Cour de Cassation viewed the Resolutions of the Institute of International Law[87] in this field as being a consolidation of the relevant rules of international law,and therefore of help in this case.Article 20 of the Institute's Resolutions provided:

'If the members of the crew ashore commit breaches of the law of the country they may be arrested by the local authorities and brought before the local courts.The captain of the ship should be notified of the arrest,but has no right to demand their surrender...'-further on in the same article:
'If the members of the crew ashore on official duty,whether individually or collectively,commit offences or crimes ashore, the local authority may proceed to arrest them but should hand them over to the captain if he should demand their surrender.'

Given the Article above,the court declared that the only question for it to decide as a question of law was whether the defendant was on official duty when he committed the offence.The Tribunal Correctionnel had decided that he was hors de service when the stabbing took place,but the Cour de Cassation came to a contrary conclusion.It was held that Triandafilou was still under orders and therefore prima facie on official duty.This conclusion was reached by assessing the purpose behind the trip ashore.The aim of the captain in sending Triandafilou into Alexandria was to obtain supplies for the warship,and to that end the mission was to fulfill the needs of the vessel.Thus it was thought logical to extend the immunity of the warship itself,which was based on its needs as a military vessel as well as its status as a ship under sovereign control,to members of the crew acting under orders to satisfy the vessel's needs.Consequently Triandafilou was prima facie immune from prosecution because he carried with him a personal immunity based on his status as part of an official disembarkation from the ship.Nevertheless, was he still on duty at the crucial time?

The court went on to decide that being on duty was a matter to be settled by observation of the person giving the order and not with regard to the person receiving it.So far as the ship's captain was concerned Triandafilou was on duty until he returned to the vessel,even if he exceeded his orders and returned after midnight.Consequently he was held to be on duty,regardless of his own actions,and immune from prosecution.

It may be thought that this was a generous decision.In the circumstances,to regard Triandafilou as still on duty when he was drunk and engaged in stabbing a policeman is perhaps to stretch indulgence towards the Greek forces.Yet there had to

be some rule established,and by coming to this conclusion the Cour de Cassation at least settled the matter as a question of whether someone was on service commandé,or hors de service. This was a relatively straightforward rule which had the merit of simplicity,and could be applied in the appropriate circumstances.Unfortunately not everyone was pleased with the result.

The Greek forces were reluctant to accept that there was no further immunity to be had,but the greatest criticism can be reserved to an American commentator in 1946,Col.Archibald King[88].This writer found the Triandafilou case and result incorrect,and he was unimpressed with the Mixed Courts' reasoning.He complained that the Institute of International Law Resolutions considered by the Cour de Cassation were designed for times of peace,and Egypt was de facto at war even if not de jure,implying that it was therefore wrong to use this 'technicality' of peace to introduce the Resolutions as a base for decisions.In fact,it can be argued that jurisdictional immunity is also a technicality,designed for a purpose, which in Egypt was to allow the least possible hindrance to the military without unduly disturbing the normal pattern of life. King went on to describe the capture of Tobruk,and the proximity of the Axis forces,pointing out that the Cour de Cassation gave its decision at the same time as the battle of El Alamein,thus presumably suggesting that the Mixed Courts should have given greater appreciation to the role of the military in defending Egypt.His conclusion was that few,if any,controls should exist over friendly foreign armed forces.The fact that the true extent of the decision in Triandafilou was barely appreciated must reduce the impact of these criticisms,although they were forcefully put.There was no question at all that the Mixed Courts would interfere with forces in action or on duty,and King's view was completely rejected by Egypt.The Mixed Courts saw their role as upholding the law in a difficult situation,and to balance the enforcement of the ordinary law with the needs of the military were prepared to extend some degree of immunity.

On the same day the Cour de Cassation delivered another judgement,concerning an appeal from the Tribunal Correctionnel of Mansourah[89].A Greek sailor had been convicted for the importation of hashish and was sentenced to one year's imprisonment.He

had claimed that as a member of the Greek navy he was immune from Egyptian criminal prosecution,and should be tried in the Greek military courts.The Cour had no hesitation in dismissing the appeal.The defendant was held not to be on any form of official duty and as he had committed an offence against the ordinary law he had been rightly punished.

The next case concerned the trial of offences committed by a Greek national before he had enlisted in the Greek Air Force. A certain Stamatopoulos had been the business agent of another Greek,Nicolas Papageorgiou(who was of unsound mind)and he was charged with having embezzled funds over a period of years from 1934 to November 3rd.1938.After the proceedings had begun but before the trial Stamatopoulos joined the Greek Air Force in Egypt,and immediately claimed immunity from prosecution on the grounds of international custom.The Parquet replied that the determining factor was that the defendant had been charged before he was in the military,and thus could not be immune whatever international law had to say about the matter[90].

This case differed from Triandafilou and Gaitanos above because it involved a land based member of the forces,and thus the Stockholm Resolutions were of no direct assistance as they referred to sailors and naval ships.Nevertheless the court had no doubt about the plea of immunity and rejected it,on the grounds that the Egyptian Government had made it plain to the Greek forces that the only concession granted to them was the right to apply their military code in internal matters.The court went on to reject the proposal of the defendant,based on The Schooner Exchange[91],that permission granted to foreign troops to enter territory without reservations meant complete jurisdictional immunity.On the contrary,the court found that the actions of the Egyptian Government could not be interpreted as relinquishing any sovereign power at all,and this was a view reinforced by the express refusal of the Egyptian Government to allow any general immunity for civil cases except where this was allowed by the doctrine of sovereign immunity.In addition,the court stated that there was no evidence that the Greek forces had ever made any request for criminal immunity[92], and this hardly accorded with a belief that it was available.

Consequently,Stamatopoulos was within the jurisdiction of the Mixed Courts.

It is worth noting that the Mixed Courts referred to the case of Ministère Public v Spender[93] as one of the foundations of their argument in the above case,and a new line of jurisprudence can be seen to develop as cases with similar facts began to be heard in increasing numbers.The view of the Egyptian Government as the sovereign power in Egypt was very important.In a case in 1943 the Mixed Courts again asked the Procureur-Général to ascertain the official view of immunity for foreign forces without special agreements,and the reply was unequivocal: 'Lorsque le Gouvernement Egyptien a accordé au Commandement des Forces Helléniques,Polonaises,Tchèques etc.le droit d'exercer la juridiction militaire et disciplinaire à l'intérieur de leurs unités,il n'a eu en vue que de leur accorder la situation juridique générale reconnue aux troupes étrangères se trouvent en corps sur le territoire d'un autre Etat,laissant aux Tribunaux Egyptiens le soin de déterminer l'étendue de cette immunité dans les limites prescrites par le droit des gens et consacrées par la coutume internationale.'[94]

This reply strengthened the gradually forming view of the Mixed Courts that at best a restrictive type of immunity could be granted,and certainly not any form of absolute immunity.

A further incident concerning the Greek forces illustrates this development.A Greek soldier had orders to go from El Alamein to Amrieh,but disobeyed them and joined up with three fellow Greek soldiers.The final result was that a British corporal was killed, and two of the Greeks were charged.Tsoukharis,the soldier who had disobeyed his orders,was charged as an accessory to murder, and his colleague Gounaris was charged with causing grievous bodily harm.So far as Tsoukharis was concerned the commanding officer of his unit signed a certificate stating that he was on duty,but the Cour de Cassation stated that to be on duty meant to be on a mission dictated by military requirements,and there could be no immunity when the mission was abused.Clearly,disobeying orders to proceed from one place to another and causing the death of a British soldier was not conduct seen as being duty,but rather an abuse of the orders given,and the court thus

established a further restriction on the immunity of persons on service commandé by assessing the real nature of the soldier's behaviour,rather than simply accepting a commanding officer's certificate[95].

The other defendant,Gounaris,was duly prosecuted,convicted and sentenced to 18 months' hard labour.Some months after his arrest the Greek military authorities began to claim that they should deal with the matter,and Gounaris appealed against his sentence on the grounds that he was immune from prosecution in any event, or alternatively he was immune in this instance because he was on duty.Both grounds of appeal were rejected.As to the first,the Cour de Cassation referred to a further communication from the Egyptian Government in a letter,which stated that the Greek forces enjoyed no special immunity,and the second was dismissed on several grounds,the most important being that the Greek military authorities' failure to claim Gounaris for themselves for six months after his arrest was a waiver of any rights they may have had over him.The basis of this latter argument was that any immunity that might be conceded was a distinct departure from the inherent jurisdiction of the Mixed Courts over foreigners,and thus the passive attitude of the Greek army towards the fate of Gounaris implied assent by it to the jurisdiction of the Mixed Courts.Once such an assent had been acted upon by the Parquet it could not later be withdrawn because the result of the case did not suit the defendant[96].This reasoning, while valid and useful in itself,also avoided the need to go into detail on the position of Gounaris as a soldier on duty or not.

The judgement in the next case dealt with the precedent so far established,and the other sources utilised by the Mixed Courts in the cases thus far to elucidate the problems and formulate answers.In Malero Manuel v Ministère Public[97] the defendant, who was accused of attempted murder,was a Spaniard serving with the French Foreign Legion in Egypt.He claimed that only the French military tribunals could try him,and as there was no agreement between France and Egypt concerning jurisdictional immunity the Mixed Courts had to go to their own developing jurisprudence for a solution.

The Cour d'Assises reviewed Manuel's case closely.It was the

arguments that had been advanced by members of the Greek forces, especially that by giving French forces the right to be in Egypt for the purposes of assisting the Allied war effort the Egyptian Government had thereby granted those forces a complete immunity from Egyptian jurisdiction over ordinary crimes.The court agreed that some immunity existed for foreign armed forces, but pointed out that its true extent was the subject of debate and discussion,as well as of recorded judgements.In developing the theory of immunity the situation of Great Britain was thought particularly helpful as an example of a country with similar problems to Egypt.

Great Britain was,with the exception of the Channel Islands, free from enemy occupation.It was also free from the occupation per se of friendly foreign troops,although these were present in large numbers.Consequently,with the English court system and administration intact,and unaffected in essence by the 2nd. World War there was a remarkable similarity between the situation in England and Egypt.Both countries were on a war footing,although Egypt had not declared war,with their political and legislative infrastructures intact,and both countries had foreign military personnel on their territory.The Cour de Cassation thus found the English view of jurisdictional immunity of great value,and was impressed by the existence of the English Allied Forces Act of 1940,regulating the jurisdictional position of foreign armed forces in Great Britain.If,the court said,the principles of international law that Manuel alleged to exist actually did so there would not,the court argued,be any need for a country such as Great Britain to enact special legislation.Further,the fact that France and the USA had apparently agreed forms of immunity for their troops with other governments over the years pointed away from an established rule rather than for one,because formal agreements would have been unnecessary if the principles of international law concerning immunity really were as well established as was alleged to be the case.

So far as Egypt was concerned there was held to be no express or implied renunciation of sovereignty[98],and the idea that a presumption of extraterritorial privilege existed was firmly resisted.The court went on to recite the official Government position on foreign armed forces,and referred to the Triandafilou,

Stamatopoulos and Tsoukharis cases discussed above[99].The Triandafilou case was especially distinguished from the Manuel case because Manuel was absent from his unit for his own personal affairs and without permission.Further,a soldier was not on duty merely because he was on active service and liable to recall. Manuel's plea of immunity was therefore rejected.Not unnaturally Manuel appealed,and the Cour de Cassation went into great detail to explain the Mixed Courts' view of military immunity.

It was again emphasised that as Egypt was not under occupation by the Free French Forces,but these forces were in Egypt to assist the Briitsh High Command to fight the 2nd.World War, there could be no imposition of French law on Manuel's case. Further,as there had been no express renunciation of Egyptian sovereignty the court had to decide what implied renunciation was consistent with Egypt's acceptance of internationally agreed principles.Although this was a matter of going over old ground again this judgement formulated firmer guidelines than had hitherto existed.

First of all it was accepted that the administration of military regulations peculiar to the forces themselves was a matter for the forces and not the local Egyptian tribunals.This was taken as a universally accepted view from which the Mixed Courts did not dissent.So far as immunity for ordinary offences outside military camps was concerned however the opinion of the commentators cited varied.The American view that local sovereignty was impliedly renounced out of respect for the foreign sovereign was disapproved,and far greater weight was placed on the writings of Lawrence and Oppenheim,and the English practice already quoted with full approval in the Tsoukharis case above.In addition,the exact immunity granted to Allied forces in Great Britain was isolated as merely involving administrative matters and discipline, as had already applied to Dominion forces under the Visiting Forces Act of 1933.

Australian practice was also quoted in support of the view that all immunities that did result from the presence of foreign armed forces were definitely exceptional and not to be lightly implied.The court then discussed the Bustamente Code favoured in South America[100].This too gave support to the theory of a restrictive immunity for offences by visiting forces,and the

court went on to consider French jurisprudence in this area, finding doctrine divided over the effects of occupation of a country contrasted with a simple sojourn or passage of troops. In Egypt's case the status of the foreign troops was clear. They were there to protect Egypt from aggression and to promote the Allied war effort.They were not in occupation of territory, and the day to day administration of Egypt continued in the normal way.It is worth emphasising again that the functioning of the Mixed Courts continued so that there was no legal vacuum to be filled,as had occurred in some countries occupied by foreign forces,and thus there was absolutely no need for a separate jurisdiction.The Cour de Cassation then proceeded to analyse various authorities,including Chung Chi Cheung v The King[101],and then gave its verdict.

In essence,Manuel was not immune because he was not on duty, having left the effective command of his unit for private purposes.Apart from the shield of military duty there was, declared the court,no generally recognised principle of international law which granted immunity to foreign troops in a country with consent.Effectively,the decision of the Cour d' Assises was repeated in a more cogent and forceful way.Manuel had,however,raised a further plea against the jurisdiction of the Mixed Courts.He alleged that the effect of the Montreux Convention was to give the Mixed Courts the jurisdiction in criminal matters which the consular courts used to have,and as the French consular courts had declined to assume jurisdiction over French military personnel it was argued that the Mixed Courts only inherited this restrictive competence.This plea was decisively rejected.Montreux was declared to have heralded the resumption of full Egyptian sovereignty in criminal matters, and as the Capitulations had been abolished completely the Mixed Courts were only bound by Egyptian law and internationally accepted principles.

Manuel was a landmark decision.It drew together various strands of previous judgements,and closely analysed the practice of other countries.It finally established the principle that the Mixed Courts had jurisdiction over all foreigners in Egypt,save for those within the exceptions of categories such as service commandé,and so laid down rules for future litigation,which

until then had not decreased in this field despite the many judgements edging towards the leading case of Manuel.

Later cases dealt with variations of the principles now firmly established.In Orfanidis v Ministère Public a Greek sailor successfully argued that his surrender by his commanding officer (after he had regained his ship)for the sole purpose of investigation of alleged offences was not a renunciation of immunity and consequently the Mixed Courts had no jurisdiction[102].A similar result occurred in Ministère PublicvGeorges Anne,where a French sailor and four fellow members of the French navy from the warships Duquesne and Lorraine were arrested on Egyptian territory for criminal offences.The Chambre de Conseil held that Anne was correctly arrested and within the jurisdiction of the Mixed Courts,as there was no binding obligation to hand him over to the captain of his ship for offences ashore.His surrender to the ship in any event was stated to be a matter for the executive and not the judiciary.

Two sailors who were surrendered by the ship for trial and remanded in custody by the Mixed Courts were held to be within the jurisdiction,but two others who were surrendered for investigation on the condition that they were returned to their ship after the investigation was concluded were held to be immune.On appeal to the Cour de Cassation it was held that the precedents then established enabled a rejection of the plea of immunity.Further,the contention that it was for France to punish such offenders,or to decide whether they were more useful on board a warship or in prison was also rejected[103].

The two final cases in this period simply confirm the established doctrine.In Gangoulis v Ministère Public a plea of immunity in a case of an indecent assault on a minor was rejected,and the court said:
'...les circonstances particulières de chacque cas devant être prises en considérations par les juges du fond pour l'exacte apprēciation de ce fait.'[104]In Ministère Public v Scordalos[105] both the Chambre de Conseil and the Cour de Cassation accepted the certificate of the Greek army that Scordalos was on duty when charged with murder,and despite the protests of the Procureur-Gēnéral would not investigate the circumstances

because Scordalos was attached to the Bureau of Naval Intelligence and 'chargé de certaines missions délicates et secrètes'.

In the light of the above cases it may be asked what contribution they made to Egyptian law and generally.First,it is important to recognise how the Mixed Courts worked in conjunction with the Egyptian Government in order to balance the views of the executive and the principles of international legal practice. They wholeheartedly recognised the effect of the Montreux Convention,but also realised the needs of the military in times of war,but without thinking it necessary to allow absolute immunity.Their policy was not to hinder the military,but not to let the military hinder the ordinary law,and there was thus no presumption of a renunciation of Egyptian sovereignty.In acting in this way the Mixed Courts showed themselves to be part of a truly Egyptian system,recognising the need to protect Egypt's interests whilst keeping to logically assessed international principles.Each case was separately considered with a very thorough testing of the theories for and against immunity. The result was a unique series of judgements which have no equal in the depth,variety,scope and learned research involved during the 2nd.World War.The especial uniqueness of Egypt was that the court system was intact,the foreign forces were there with consent and prepared to litigate to protect their own interests, and the Mixed Courts were prepared to ignore external pressures and decide in the interests of justice.This enhanced their own standing abroad,given the foreign troops concerned,and also added to the respect with which they were held in Egypt.

The judgements were a further indication of the research continually present in decisions of the Mixed Courts.The views of jurists,writers,and courts throughout the world were traced and discussed,so that the final decision in any case was,together with Egyptian precedent as it developed,solidly based on valid ground.The results were also characteristically practical.A court martial,the alternative to jurisdiction by the Mixed Courts over crimes,was quite inappropriate for ordinary crimes, and the exceptions made for the British forces,limited as they were,must be seen in the light of the voluntary Treaty agreed between two sovereign states before the 2nd.World War was a reality.It was indeed fortuitous for the British forces that the

1936 Treaty could be applied to the years 1939 to 1945.

It is also necessary to state that the Mixed Courts acted in a way that prevented any potential resentment at foreign military jurisdiction,and an apparent return to the days of the old consular courts and the theory of actor sequitur forum rei.The Mixed Courts realised that all that had changed.In addition,the Mixed Courts felt that it was quite wrong if a war to defend the rule of law should itself cause the breakdown of this rule unless necessary.It was not thought necessary for the armed forces to have immunity from ordinary crimes,and the threat to public order if foreign troops had been able to escape with impunity was too risky to contemplate,especially when hostile forces were so close.If Greek and French personnel were allowed to behave as they pleased it would have been to the annoyance and aggravation,not to mention the possible provocation,of the local residents.

All in all therefore the cases added a new dimension to the jurisdiction of the Mixed Courts,and brought their work to the attention of a wider audience abroad than had been the case before.In Egypt the decisions firmly upheld the rule of law and influenced the behaviour and attitudes of the commanders of the thousands of non-British foreign troops on Egyptian territory,as well as confirming that the Mixed Courts were immune to pressure designed to make them relinquish the criminal jurisdiction they had so newly gained.Finally,it is a tribute to the judiciary and staff involved that they were able to maintain their approach to the new problems despite the facts of the 2nd.World War,and despite the impending closure and merger of the Mixed Courts themselves,which necessitated a large number of the staff being involved in the transitional process.

General Jurisprudence.

The general work of the Mixed Courts went on during the war, and while few cases of note arose there are three areas that merit attention.

The first concerned criminal jurisdiction on board foreign merchant vessels.Following generally accepted practice foreign ships were treated in Egypt as carrying with them the right of internal management according to the law of the flag flown by the ship.The question for the Mixed Courts was the extent of this right in relation to crimes against Egyptian law committed on board foreign merchant ships in Egyptian ports.(The question of foreign armed vessels has already been discussed,above,in the previous section).

For example,in February 1938 a certain Kuti Gomes was arrested and charged with attempting to sell hashish on board a British vessel in Port Said harbour.The Tribunal Correctionnel at Mansourah declined jurisdiction,and on appeal by the Procureur-Général it was held that the Mixed Courts did have jurisdiction. The port was Egyptian territory,and any concession to,or acceptance of,the principle of the law of the flag could not prevent the Mixed Courts assuming jurisdiction over offences committed on board foreign merchant vessels when they affected the internal peace and order of Egypt[106].This was another aspect of the rule of law and Egyptian sovereignty,and the decision was a deliberate move by the Mixed Courts against the further manifestation of foreign immunity.

The second area concerned the issue of licences by the Government. In 1938 the Egyptian Government was sued by a restaurant owner for the return of moneys paid as a condition for a rokhsa(licence) permitting a night club to be operated in La Cigale,a restaurant in Port Said.The facts were straightforward.In 1932 the owner applied for a licence for his premises,but this was refused on the grounds that there were insufficient policemen in Port Said to supervise another night club.After lengthy negotiations between the owner and the police it was finally agreed in January 1933 that a licence would be granted for a year,renewable,on condition that LE 14 per month was paid to the authorities from

August 1933,to represent the wages of an officer to supervise the premises.The restaurant owner duly paid this sum monthly, but after some time ceased payment and claimed back LE 358. The Cairo District Court dismissed his claim,and on appeal the Mixed Court of Appeal also dismissed it,saying in reply to his allegation that the Government was not entitled to enforce conditions for the grant of a licence that the terms and conditions on which a licence was granted were entirely up to the Government,even if the conditions complained of were not imposed on other applicants.The court clearly considered that if the applicant wanted a licence for such an activity as a night club,with all the attendant problems of public order, he had to be prepared to pay for the privilege[107].

A further development in the topic of licences concerned bathing huts in Alexandria,where the Municipality controlled bathing facilities.A rokhsa for a bathing hut was valid for one year,usually for a period from May to April,and renewable at the Municipality's option.A licence holder complained that he had been required to move to another site against his will, and sued the Municipality for damages.It was held that the contract was simply one of hire,and therefore the ordinary rules of civil law applied without any overlap with the rights and obligations of quasi-governmental institutions.The Municipality 'n'accomplit pas des actes qui rentre dans les cadres de ses pouvoirs public;elle agit comme agisait un simple particulier'. Thus because the terms and conditions of the hire were open and clear the Municipality could transfer holders to other sites for reasons of its own,but it could not,the court said,exercise its discretion by way of favouritism or for a whim.Consequently,in the circumstances the Municipality was ordered to pay damages.

This view of the bathing site rokhsa was not settled however, because there was considerable debate over whether the issue of such licences was within the field of administrative law or not.In fact,the problem was more theoretical than practical as there was no system of administrative courts to refer to, until a sort of court was established in 1946,and the Mixed Courts could still award damages in an appropriate case;the rule against pronouncing on questions of sovereignty under Article 43 of the Revised Regulations expressly allowed the

Mixed Courts to award damages for breach of the law in administrative matters.In general the Mixed Courts resisted all efforts to draw a real distinction between civil and administrative actions where the grant of this type of licence was concerned,and effectively treated the matter as one of contract[108].

To conclude this section it is necessary to mention briefly the effect of the war in relation to legal rights in the Mixed Courts.In conformity with the principle of Egyptian sovereignty the Mixed Courts did not pronounce on the laws passed to assist wartime measures,such as the sequestration of enemy alien property,provided that there was no abuse of the law[109].This was a straightforward and logical position to take, and was entirely consistent with previous practice in the Ist. World War and with the Montreux Convention's reassertion of a fully sovereign Egyptian legislative potential.The only difference was that the Ist.World War had seen a much more prominent position taken by the British Military Authorities,as the Army of Occupation,whereas more of the regulations in the 2nd.World War were seen to emanate from the Egyptian Government itself.

The Closing of the Mixed Courts.

The pronounced aim of the Montreux Convention was to amalgamate the Native and Mixed Courts, and to abolish consular jurisdiction and the Capitulations. The latter aim was achieved by the transfer to the Mixed Courts of criminal jurisdiction over foreigners, leaving the consular courts as courts of personal status only (with the exception of the British Consular Court in Egypt, set up as a result of the Anglo-Egyptian Treaty of 1936), and the former was achieved by a gradual process over the last 12 years of the Mixed Courts.

In March 1946 the stage had been reached whereby the higher grade administrative staff and most of the other grades were Egyptian nationals. Also that year the Government established a single Administration de la Publicité Immobilière to replace the land registry work of the Native, Mixed and Sharia courts[110], and in 1947 the remaining juridiction gracieuse mixte was transferred to the Egyptian Government's direct control[111]. The decision not to attempt a translation of the cases pre-1937 had left the staff free to develop and supervise the translation of other necessary documents and post-1937 judgements, and in 1948 a partial rebate on court fees was allowed if pleadings were presented in Arabic. This illustrates the concern felt by the Government to maintain a smooth transfer of cases, and when the Mixed and Native Courts finally merged into the new National Courts on October 15th. 1949 it was with an administrative machine in full working order, and with a full set of recent cases available for all the judges new to the Mixed Court way of doing things to refer to if necessary, translated for them.

Credit for the smooth transfer of the background secretariat must go largely to Wadih Maakad, the much respected last Inspecteur en Chef des Greffes des Juridictions Mixtes, who as administrative head of the Mixed Courts ensured a well run and efficient organisation for the entire Mixed Courts' system in Egypt. It is a measure of the esteem in which he was held that he was appointed the Greffier en Chef de la Cour d'Appel, as the new administrative head of the National Courts. The appointment of the administrative head of the Mixed Courts also reflected

well on that system.The appointment of Wadih Maakad ensured that the new system was able to function efficiently and correctly from the beginning,and the same energy,hardwork and leadership went into the new National Courts as had gone into the Mixed Courts.

Most of the Mixed Court judiciary of Egyptian nationality transferred to the national Courts,but all foreign judges retired with a grant of the Order of the Nile from Farouk, King of Egypt.Of the 575 personnel left with the Mixed Courts after the transitional reorganisation approximately 113 were European,and many more of Egyptian nationality had little or no knowledge of Arabic.Naturally,the new courts needed Arabic speakers,and so the Egyptian employees who were not fluent had to join the foreigners in redundancy,although compensation was paid by the Government.Members of the staff pension fund set up by Adib Maakad bey were further protected.

Members of the Mixed Court Bar without a good knowledge of Arabic were also in difficulty,as the National Bar only accepted those with Arabic,although many who were not fluent joined with members of the National Bar as consultants in new firms.The rest had to make do with alternative employment or the small pension granted by the Egyptian Government.

In June 1948 there were thousands of cases pending before the Mixed Courts,as the following table illustrates:

	Civil	Criminal	Total
Mixed Court of Appeal	834	-	834
Alexandria	1378	86	1464
Cairo	3274	126	3400
Mansourah	620	12	632
Port Fouad	334	15	349
			6679

All these were transferred without difficulty to the new National Courts.In fact,cases that were begun before 1949,or involved Mixed Court law were still being heard in 1956.Thus a case started in the Alexandria Referee Court,concerning an arbitration clause,was sent to the new Alexandria District Court in 1949,heard in 1950,with an appeal in 1952,and then on to the new Cour de Cassation in 1956[112].

In 1951 another case that had begun in the Mixed Courts was finally decided.A divorce had been granted by the Mixed Courts in 1949 to a couple,and custody of the child was awarded to the mother.The father,a moslem,strated an action three months later in the Summary Tribunal of the Sharia Courts in Choubrah,Cairo, for custody.It was held that the dispute should be resolved by the Cour de Cassation in General Assembly[113].Also,the Alexandria Court of Appeal affirmed a judgement of the Mixed Courts in a tax case where a foreign company,controlled and active abroad,was held not to be liable for tax on isolated profits in Egypt[114].These serve to illustrate the smooth transfer of pending cases,and the continuing respect shown to the activities of the Mixed Courts,even after the 1952 revolution.

Thus the 74 years of the Mixed Courts grew into a unified system with the younger partner,the Native Courts.The ceremonies to commemorate the occasion were often emotional and always full of praise for the work of the Mixed Courts.For the majority of the foreigners working in the Mixed Courts 1949 marked the end of their legal work in Egypt,although some stayed in various other official or commercial positions.The merger of the two parts of Egypt's main court system was almost unbelieveably free of difficulties,and the new courts began their work with the history and traditions of the Mixed Courts behind then, alongside those of the old Native Courts.

What had the Mixed Courts achieved?What legacy did they leave to Egypt and to the new National Courts?Throughout their history, from the beginnings in the 1870s to the twilight years after 1937,they were influential and powerful.Their consequential role in Egyptian legal history is discussed in the next chapter.

Notes to Chapter 9.

1.Art.2 Convention:Sous réserve des principes du droit international,les étrangers seront soumis à la législation égyptienne en matière pénale,civile,commerciale,administrative,fiscale ou autre.Il est entendu que la législation à laquelle les étrangers seront soumis ne sera pas incompatible avec les principes généralement adoptés dans les législations modernes,et ne comportera pas,specialement en matière fiscale,de discrimination au détriment des étrangers ou au détriment des sociétés constituées conformément à la loi égyptienne dans lesquelles les étrangers ont des intérêts serieux.
La deposition qui précède,en tant qu'elle ne constitue pas une règle reconnue de droit international,ne sera applicable que durant la période transitoire;Actes de la Conférence des Capitulations,Montreux,12 Avril-8 Mai 1937,Compte Rendu,1937, Liège,Vaillant-Carmanne SA,p.262;the Arabic,French and English texts were equally authentic,but the revised Règlement d'Organisation Judiciaire,referred to in these notes as Rev.Regs.,were valid only in the French version.
2.Protocol-Non-Discrimination:It is understood that the provisions of Article 2,para.2,of the Convention relating to the non-discrimination rule and applicable during the transition period must be interpreted in the light of international practice relating to undertakings of that nature between countries enjoying legislative sovereignty.
The second part of the Protocol provided that while the selection of foreign judges should be a matter for the Egyptian Government only persons approved by the Governments of the former Capitulatory Powers would be appointed.This agreement is almost more favourable to the foreign Powers than the original provisions of Art.5,ROJ,see Chapter 2 note 43.
There was of course a difference between laws specifically against foreigners and laws which happened to affect foreigners more than locals.Thus taxes on stock exchange dealings and professional practices,which initially mostly affected foreigners, were not discriminatory per se and,eg,Law no.111 of 1945,which prevented foreigners owning property in the frontier districts, was passed without real opposition.Law no.98 of 1944 provided that only Egyptian nationals could practice in the Native Courts,

but a later law,Law no.51 of 1949,allowed Mixed Court lawyers with a knowledge of Arabic to transfer to the Native Bar.Also, Law no.138 of 1947 set down a minimum percentage of Egyptian shareholders(51%)for Egyptian companies,and provided for 40% of the directors to be Egyptian,with a minimum percentage of Egyptian employees.All of this reduced the scope for the employment of foreigners,especially where they competed for jobs with Egyptians.The communities most affected were the Greek and Italian,both of which had many unskilled or semiskilled workers. A further set of proposals in 1949 suggested restrictions on the ownership of agricultural land by foreigners.

3.Art.13 Montreux Convention.

4.Art.1,Law no.89 11.10.1937,and Law no.58 31.7.1937;see note 22 below.

5.Law no.57 31.7.1937-Code d'Instruction Criminelle Mixte(MCCr.I), see note 23 below.

6.Art.1 Law no.89 11.10.1937.

7.Art.2 ibid.

8.Law no.49 24.7.1937,Règlement d'Organisation Judiciaire pour les Tribunaux Mixtes-Periode Transitoire(Rev.Regs.).

9.Art.26 Rev.Regs.:Les tribunaux mixtes connaissent de toutes contestations en matière civile et commerciale entre étrangers et entre étrangers et justiciable des tribunaux nationaux. And in addition,Art.33 Rev.Regs.:Sous réserve des dispositions des articles 34,35,36 & 37,la compétence des tribunaux mixtes est determinée uniquement par la nationalité des parties réellement en cause,sans égard aux intérêts mixtes qui pourraient être indirectement engagés.

10.Art.34 Rev.Regs.;the Minutes of the Drafting Committee's report show that 'serieux' was taken to mean 'that the interests concerned are neither of a trivial nor of a fictitious nature.It shall be left to jurisprudence to decide upon that question',see Actes de la Conférences,op.cit.,p.245;ibid,at p.187,Badawi Pasha said,after accepting in principle the continued jurisdiction of the Mixed Courts over Egyptian companies with 'substantial' foreign interests:Mais il n'est pas possible d'admettre,même pendant la période transitoire,les errements qui ont conduit à cette situation de fait.Dans le régime nouveau...aucun argument ne peut être invoqué en faveur d'une règle qui soustrairait à la juridiction des tribunaux nationaux(sic)une société créé sous

l'égide des lois égyptiennes et de nationalité égyptienne; presumably in keeping with nationalist sentiment the Native Courts were often referred to as National Courts at this time. In fact,it was only when the Native & Mixed Courts merged in 1949 that the new organisation became properly known as the National Courts.

11.Art.35 Rev.Regs.;the case was transferred whenever the foreign creditor made a formal appearance.

12.Art.36 Rev.Regs.

13.Art.37 Rev.Regs.

14.Art.40 Rev.Regs.

15.Art.53 Rev.Regs.

16.Art.43 Rev.Regs.:Les Tribunaux Mixtes ne peuvent connaître directement ou indirectement des actes de souveraineté.Ils ne peuvent pas statuer sur la validité de l'application aux étrangers des lois ou règlements égyptiens...

17.Art.9 Montreux Convention.

18.Thus Belgium,Denmark,France,Great Britain(together with Australia,Canada,British India and New Zealand),Greece,Holland, Italy,Norway,Spain,Sweden and the USA formally retained consular jurisdiction for personal status.By Law no.88 11.10.1937 the Egyptian Government added Austria,Czechoslavakia,Germany, Hungary,Poland,Rumania,Switzerland and Yugoslavia,in compliance with a Declaration at the Convention.These countries,it will be remembered,had been treated as having Capitulatory rights at various times,despite changing political and legal circumstances.

19.Law no.94 11.10.1937,adding a 5th.Title of 108 Arts.(Art.817-925)to the Code de Procédure Civile et Commerciale Mixte;see also Chapter 8 note 100.

20.Art.29 Rev.Regs.

21.Art.30 Rev.Regs.

22.Code Pénal,Law no.58 31.7.1937;the old separate Penal Codes were repealed and one Penal Code of 395 Arts.was substituted for use in both court systems;see note 4 above.

23.Code d'Instruction Criminelle Mixte(MCCrI)353 Arts.,Law no. 57 31.7.1937;see note 5 above.

24.Art.210 MCCrI.

25.Art.220 MCCrI.

26.Art.226 MCCrI.

27.Art.256 MCCrI.

28.Declaration 5 Montreux Convention,in Actes de la Conférences, op.cit.,p.278;ibid.p.277 for provisions relating to deportation, Declaration 4-the Procureur-Général of the Mixed Courts was to sit on an administrative advisory committee to review deportation cases.
29.Law no.90 11.10.1937,modifiying Decree of 14.6.1883,and amending Art.15 of the Native Règlement d'Organisation Judiciaire:(1) En matière civile et commerciale les Tribunaux nationaux(sic) connaissent de toutes les contestations à l'exception de celles entre étrangers justiciables des Tribunaux mixtes ou dans lesquelles un de ces étrangers est partie.
30.Art.52 Rev.Regs.
31.Nessim Nathan v Mitsui Bussan Kaisha Ltd. Alex.Commercial Court 6.2.1939 Pres.Vroonen GTM XXX p.9;T.Coutsolioutsos & Sons v M.Klein & Sons Alex.Commercial Court 27.3.1939 Pres.Vroonen GTM XXX p.9;see e.g.Chapter 4 notes 1,2,3 for earlier attitudes.
32.Amended Art.15(3) of the Native ROJ.
33.Tribunal Correctionnel Alex. 16.4.1938 BLJ L p.238.
34.Art.43 Rev.Regs.
35.Art.44 Rev.Regs.
36.Law no.49 24.7.1937.
37.Art.15 para.3 Montreux Convention:The present Convention shall come into force on Oct.15th.1937 if three instruments of ratification have been deposited.It shall not however come into force in respect of the other signatories before the date of the deposition of their respective instruments of ratification.
38.It could be argued from Art.56 of the Rev.Regs.that ratification was only necessary for personal status matters.Arts.25,44, 45 & 58 of the Rev.Regs.also indicated a clear application of Egyptian law,and Art.2 of the Convention itself(see note 1 above) gave Egypt legislative freedom.
39.MCCass. 6.6.1938 BLJ L p.238;this was seen,in a detailed judgement,as reflecting English,Italian & Belgian practice in that treaties only gained legal force from internal legislation; the same view was the basis of an official letter from the Egyptian Minister of Justice to the Procureur-Général of the Mixed Courts 24.3.1938.
40.MCCass. 27.2.1939 Pres.van Ackere GTM XXX p.22,from MCd'Assises 23.1.1939 Pres.Bassard.
41.See note 18 above.
42.Spiro Jean Xanthakis & another v Egyptian Government,

MCA 10.3.1938 Pres.SE Yussouf Zulficar Pasha GTM XXIX p.388;see also Chapter 7 notes 41,42,43.

43.Attendu que les appelants reconaissent,avec la jurisprudence de cette Cour,qu'à défaut d'une loi spéciale sur la matière, l'Etat Egyptien n'est responsable des dommages subis par les particuliers en cas d'émeute,que si le fait dommageable est dû à une faute d'action ou d'omission,précise et grave,imputable aux agents de police chargés de la répression des désordres et du rétablissement de l'ordre public;or,contrairement à la thèse des appelants,rien de pareil ne résulte du dossier...

44.Egyptian Government v Palestine State Railways Administration MCA 17.6.1942 BLJ LIV p.243;see also Chapter 7 note 38;Fouad Abdel Moneim Riad,Jurisdictional Immunity of Foreign States,ESIL, 1964,Vol.20,p.109-111,where the principles established by the Mixed Courts are confirmed as the basis of Egyptian legal thought in this area.

45.Brandt & Co. v Egyptian Customs Administration MCA 29.1.1942 BLJ LIV p.85;see a similar decision in Chapter 8 note 30.

46.19.9.1935.

47.Art.43 Rev.Regs.;see note 16 above;this prohibition could not presumably have prevented a view being taken as to whether the law in question was incorrectly enacted,or otherwise not applicable to all Egypt's inhabitants,although there appears not to be any non-taxation case in which this was done(see note 56 below);in fact the provision was not,in this instance,any different in effect from the old Art.11 of the ROJ,as modified by Decree 26.3.1900.

48.Alex.Commercial Court 29.3.1943 BLJ LV p.114.

49.Law no.14 23.1.1939;employees paid as follows(Art.63):

2%	on the first LE 120	5%	from 500 to 800
3%	from 120 to 300	6%	from 800 to 1200
4%	from 300 to 500	7%	on the residue.

50.Tax of 7½% of the rental value of the professional premises was levied.No tax was charged in the first 5 years,or after the age of 60.If the premises were also the practitioner's home the tax was 10% of the total rental value-Arts.72-77 Law no.14 1939.

51.Hoirs G.Cordahi bey & others v Alexandria Municipality MCA 23.6.1938 Pres.SE Yussouf Zulficar Pasha GTM XXIX p.313.

52.See e.g.Chapter 8 note 79.

53.Cercle Syrien & others v Alexandria Municipality,Alex. District Court 10.1.1942 Pres.Soliman Yousri bey GTM XXXV p.103.

54.Art.31 Organic Decree 5.2.1890 & Bye-law of 30.3.1933; although these predated complete fiscal and legislative freedom in Egypt the provisions nevertheless applied to all after 1937.
55.MCA Pres.ScandarAzer bey:(1)&(2)Cauro & Spiteri in liquidation v Egyptian Government 21.12.1939;(3)G.Schiralli & Co. v Egyptian Government 21.12.1939;(4)&(5)Egyptian Government v Delta Motor Transport Co. in liquidation 24.6.1943;see also Chapter 8 note 80.
56.Decision of Council of Ministers 30.12.1931 for road tax; Decree(for the construction of agricultural roads)3.11.1890.
57.Art.1 & Art.6 Decree 3.11.1890.
58.Law no.2 1940.
59.Art.7 of the Convention of 26.8.1936:...les camps brittaniques, les Forces Brittaniques et leurs membres seront exemptés de tous impôts et taxes(autres que les droit municipaux pour services rendus)et de tous droits et charges d'enregistrement,à moins qu'il n'en soit convenu autrement entre les deux Gouvernements; Certain charges,such as car licences and wireless set fees were expressly allowed,under Art.7(a)&(d),see Pupikofer & Schemeil, Répertoire Fiscale Pratique Egyptien,1939,Alex.,Edition du Journal des Tribunaux Mixtes,p.132.
60.Hewet v The Treasury,MCA 28.3.1949 BLJ LXI p.91.
61.e.g.Dame Galila Basiouni Amrane v Col.ES John,Alex.District Court 14.1.1932 Pres.Jonkheer van Asch van Wyck GTM XXIV p.108; see Chapter 8 note 39.
62.Guebali v Colonel Mei,Cairo District Court 22.4.1943 BLJ LV p.120.
63.MCA 3.1.1948
64.During the 2nd.World War an executive agreement between the US and Egyptian Governments provided for criminal jurisdiction over United States forces in Egypt to be exercised by the USA from the date of the agreement for the duration of the war(there were comparatively few US military personnel in Egypt)-Military Proclamation no.375 2.3.1943.
65.MCA 30.5.1938 BLJ L p.334.
66.Letter of 6.3.1939.
67.Ministère Public v Alexander Spender 1939 GTM XXX p,37.
68.See also Ministère Public v Antonio Cachia GTM XXXI p.60:les tribunaux mixtes ne sont dans aucun cas compétents en matière pénale pour connaître des infractions commises par les membres des Forces Brittaniques.
69.MCCass.24.1.1944.

70.Holder v Ministère Public MCCass.24.4.1944.
71.MCCass. 1944 JTM(1944)no.3346 p.4.
72.Skoullan v Ministère Public 1947 BLJ LIX p.132.
73.Art.1 CP:Le présent code est applicable à tous qui,en Egypte, commettent les infractions prévues par ses dispositions.
74.A special court adapted from the British consular court was established by the British Government to deal with matters,known as His Brittanic Majesty's Consular Court in Egypt(Order in Council 2.10.1937)in addition to the usual military procedures.
75.Capellani v London & Lancashire Ins.Co.Ltd. MCA 12.2.1947 BLJ LIX p.93;this case followed directly the reasoning in Dickinson v Del Solar [1930] 1 KB 376.
76.Hénon v Egyptian Government & British Admiralty,Cairo District Court 2.4.1947 BLJ LIX p.225.
77.Art.5 Convention 26.8.1936.
78.Papanicolou v Ministère Public 1946 BLJ LVIII p.92/3.
79.Art.44 Rev.Regs.:Les Tribunaux Mixtes connaissent de toute poursuite contre un étranger pour un fait punissable par la loi; see note 18 above for a list of nationals within the definition of foreigner;see note 73 above for Art.I CP.
80.As a consequence of the war judges of enemy nationality were replaced by Egyptians:Vittorio Emmanuele Impollomeni(Alex. District Court)& Vincenzo Falqui-Cao(Cairo District Court Vice-President)were dismissed 1.11.1940;a German judge,Walther Uppenkamp,had not returned in 1939,and an Austrian,Eduard Michmayr (Alex.District Court)was removed from office;a Hungarian judge, Etienne Szaszy(Mansourah District Court)was dismissed 26.1.1942 when Hungary declared war on Great Britain.The Austrian,German, and Italian consular courts for personal status were closed and cases transferred to the Mixed Courts.
81.e.g.Archibald King,Further Developments concerning Jurisdiction over Friendly Foreign Armed Forces,AJIL,1946,vol.40,p.257;also King,Jurisdiction over Friendly Foreign Armed Forces,AJIL,1942, vol.36,p.539-King had been a Colonel in the US Judge Advocate General's Department;for a spirited and learned defence of the Mixed Courts' view see JY Brinton,The Egyptian Mixed Courts and Foreign Armed Forces,AJIL,1946,vol.40,p.737-Brinton was then President of the Mixed Court of Appeal.
82.The French forces in Egypt were Free French.
83.July 1941 JTM(1941)no.2873,p.4.

84.Letter dated 5.7.1941.
85.MCCass.29.6.1942 Pres.van Ackere BLJ LIV p.259;Chambre de Conseil advice 14.3.1942 BLJ LIV p.132;Tribunal Correctionnel Alex.4.5.1942 BLJ LIV p.189.
86.See notes 83&84 above.
87.Stockholm Resolutions 1928;this work was considered by the court as a reproduction of similar work at The Hague in 1898.
88.See note 81 above,articles in AJIL.
89.Gaitanos v Ministère Public,MCCass. 29.6.1942 BLJ LIV p.257; Tribunal Correctionnel Mansourah 14.5.1942.
90.Panos Stamatopoulos v Ministère Public,MCCass.,23.11.1942 Pres.van Ackere BLJ LV p.30;Tribunal Correctionnel Cairo 20.4.1942.
91.Schooner Exchange v M'Fadden(1812) 7 Cranch 116.
92.Indeed,the Egyptian Government's letter,see note 84 above, can be taken as a rejection of both criminal and civil immunity, regardless of what was actually sought by the Greek forces.
93.MCCass.30.5.1938,see notes 65,66,67 above.
94.8.4.1943;the case in question was Sarnazos v Ministère Public,1943 JTM(1943)no.3150 p.3.
95.Ministère Public v Tsoukharis,MCCass.8.2.1943 BLJ LV p.89;in a later case where a Greek sentry left his post for lunch,and stabbed a man after drinking from 11 am to 3 pm the Mixed Court again rejected a plea of immunity:nul militaire ne peut abuse de ce que l'on appelle le 'service commandé'-Cambouros v Ministère Public,1944 JTM(1944)no.3259 p.2.
96.Gounaris v Ministère Public,MCd'Assises 30.3.1943;letter explaining Greek Forces' status 8.4.1943;MCCass.10.5.1943 BLJ LV p.156.
97.MCd'Assises 23.1.1943 BLJ LV p.40;MCCass.8.3.1943 Pres.van Ackere BLJ LV p.125.
98.It must be remembered that Egypt had fought long political and diplomatic battles to reestablish full sovereignty via the Montreux Convention.
99.See notes 85,90,95 above.
100.Resolutions of 20.2.1928,Sixth Conference on International Law of the American States,Art.299:Nor are the penal laws of the State applicable to offences committed within the field of military operations when it authorises the passage of an army of another contracting state through its teritory,except offences not legally connected with the said army.

101. [1939] AC 160,PC;other authorities referred to were:
Fauchille,Traité de droit international public 1921-1926 vol.I Part I p.26 etc.
The Schooner Exchange v M'Fadden(1812) 7 Cranch 116.
Casablanca Incident(Gidel-Revue générale de droit int.public, vol.XVII p.326).
Hudson,International Legislation,vol.IV p.2323.
Lawrence,The Principles of International Law,1937.
Oppenheim,International Law,vol.I(5th.ed.Lauterpacht,1937)p.662.
The Pearl(Sirey,1868,I p.351).
Travers,Droit pénal international,vol.II.
102.MCCass.31.5.1943 BLJ LV p.169;Art.20 Stockholm Resolutions, see note 87 above,para.2:If the offenders regain their ship without having been arrested,the local authorities have no right to board the ship for the purpose of arresting them but can only require that they should be handed over to the tribunals which are competent according to the law of the flag and that they(the local authorities)should be informed of the result of such proceedings;A similar result occured in a later case when four members of the Greek navy were arrested by the Egyptian police in Port Said for alleged grievous bodily harm.After the arrest they were handed to the military police of the ship,and on a later charge in the Mixed Courts claimed immunity.The Cour de Cassation held that immunity would be granted despite the fact that they had been arrested-Ministère Public v Nicholas Korakis MCCass. 11.12.1944 BLJ LVII p.66.
103.Ministère Public v Georges Anne,Ch.du Conseil Alex. 12.6.1943 BLJ LV p.186;MCCass. 13.12.1943 BLJ LVII p.52.
104.1944 JTM(1944)no.3260 p.3.
105.1944 JTM(1944)no.3308 p.2.
106.Ministère Public v Kuti Gomès,MCCass.13.6.1938 BLJ LI p.361; Hussein Baba v Ministère Public 2.1.1939 BLJ LI p.68.
107.Fernand Ramuz v William J Ablitt bey & Egyptian Government, MCA 21.3.1940 Pres.Scandar Azer bey GTM XXXV p.11,on appeal from Cairo District Court 10.1.1938;original application for licence in conformity with Law no.1 of 9.1.1904.
108.Baudrot v Alexandria Municipality,MCA 18.11.1944 GTM XXXV no.25;Inès Fleri,Alexis Geronimo,Pacifico Luzzatto v Alexandria Municipality,Summary Tribunal Alex. 12.7.1943 Pres.White Ibrahim bey GTM XXXIV p.33;GTM XXIV p.30;the English cases of

Blundell v Catterall(1821)5 B&Ald 268,Pelham v Littlehampton UDC (1898)63 JP88,and Brinkman v Matley [1904] 2 Ch.313,were discussed in relation to this matter.

109.Victor Harari v HE Mohamed Zaki El Ibrachi pasha,MCA 16.5.1944 Pres.Comte de Andino GTM XXXV p.69.

110.Law no.114 1946;effective 1.1.1947.

111.Law no.68 1947;effective 1.1.1948.

112.Cour de Cassation 12.4.1956;Alex.Court of Appeal 28.4.1952; Alex.District Court 22.5.1950;see ESIL 1957 vol.13,p.127/128.

113.Cour de Cassation 19.5.1951;Mixed Court decision 19.1.1949; see also Greek Community v Greek Patriarch as Nazir of wakf property,Cour de Cassation 19.5.1951,where it was held that it was for the General Assembly of the Cour to decide which court had jurisdiction,not whether one or other decision was correct. The Mixed Courts were held to have been competent,not the Sharia courts;see ESIL 1952 vol.8,p.143 & p.147.

114.Ministère des Finances v SA ex-Filature Van Haegarden Boonen, Alex.Court of Appeal 2.1.1951;Alex.District Court 25.5.1949; interpreting Art.33 of Law no.14 1939;ESIL 1951 vol.7 p.157;a case on trademarks was heard by the Cour de Cassation 23.6.1955- Soc.Allemande Shirring v Soc.Brittanique Shirring.The original decision of the Mixed Courts(Cairo District Court 11.6.1949)was reversed by the Court of Appeal 9.5.1951,but restored by the Cour de Cassation-La Gazette Fiscale,Commerciale et Industrielle, (1957)vol.78/79 p.1.

CHAPTER TEN
CONCLUSION.

A view of the present court system in Egypt would not immediately remind the onlooker of the Mixed Courts.Although Summary and District Courts still exist,they are more numerous and spread more evenly over Egypt's territory,with establishments in each governorate cpaital.Instead of one Mixed Court of Appeal in Alexandria there are six Courts of Appeal at Alexandria,Assiut,Beni Suef,Cairo,Mansourah and Tantah.The Supreme Court of Appeal,often called the cour de cassation,is the highest appeal court,and is located in Cairo.It is more directly recognisable as a descendant of the Plenary Session of the Mixed Court of Appeal,rather than as a copy of the French Cour de Cassation.Indeed,it can rehear cases in the same way as the Plenary session could,and like the Plenary session gives binding judgements,as well as being able,if appropriate and if chosen,to remit a case[1].

Court facilities are now crowded,and lower courts in Alexandria sometimes sit in rooms used previously as offices for higher officials,or in the old salles des deliberations of the judges.Consequently these courts are more informal,and a considerable degree of pre-trial procedural matters appear to be settled by unofficial reference to the Greffier en Chef in the same way that such matters might be dealt with by a Master of the Queen's Bench Division in England,rather than by reference to a judge.Delay is generally accepted,albeit reluctantly, and most judges have a heavy workload.

The Courts of Appeal are more sedate and resemble the traditional and formal pattern reminiscent of descriptions of the Mixed Courts.The Supreme Court of Appeal is treated with considerable respect,and its decisions are widely reported.

There is no real difference in work patterns.The judicial vacation remains a practice,although plenty of work arises between July and October,but usually the courts operate six days a week,resting on Friday,rather than on Friday and Sunday as occurred in the Mixed Courts.Official holidays in the Mixed Courts included all Moslem and Christian festivals.In the National Courts now only Moslem festivals are formally

recognised,but Christian judges and employees appear to be granted leave on main Christian festivals.

In addition to the above changes,many of which are also variances from the Native Courts,an onlooker comparing the Mixed and present system would notice no juridiction gracieuse in the present framework,nor any influence by the courts on legislation.In brief,therefore,the present Egyptian system has altered over the years,and little of the physical pattern of the Mixed Courts survives.

What then of the people who worked in the Mixed Courts?It has already been mentioned that Wadih Maakad became Greffier en Chef de la Cour d'Appel in 1949.His brother,Adib Maakad bey,transferred to the Ministry of Justice and later worked under the transitional United Nations' judicial arrangements in Libya.He was also responsible for co-editing the official French translation of the 1949 Civil Code.

Adly Andraos,a judge,joined the Egyptian Government service,as did many of his colleagues,and became Ambassador to Paris and Athens.Adel Younes,who had been head of the Parquet in Alexandria,was later to become head of the Supreme Court of Appeal in Cairo.

The Egyptian Society of International Law,inspired by Jasper Brinton,the American President of the Mixed Court of Appeal from 1943 to 1948,was set up in 1945 through the hard work and enthusiasm of many members of the Mixed Court Bench,Bar and personnel,including Maître Charles Ayoub,Conseiller Royal and ex-chef de la Délégation du Contentieux de l'Etat à Alexandrie,Judge Farid el Pharaony,and Wadih Maakad.Judge Brinton, together with two other ex-judges of the Mixed Courts,was appointed to draft a new Maritime Code,a plan which has still, despite all efforts,not come to fruition;it is now the task of others,and the old law remains.

Other members of the Bench,Bar and personnel also went into various spheres of Egyptian professional life,thus taking with them their experience and training,and many of the Egyptian Mixed Court judges became judges in the new courts[2]. Needless to say,this diffusion of experience and talent served directly and well in the immediate years after 1949,but its

long term effect is negligible in the context of the changing political and social times since then.Nevertheless,the respect with which the educated Egyptian regards the Mixed Courts is astonishing,given the length of time since their closure,the lack of any direct reminder of their existence,and the omission of their history in all but the briefest way from most legal courses of study.

What,if anything,did the Mixed Courts contribute to the present Egyptian Codes?The greatest change was the Civil Code.The Maritime and Commerce Codes were the old ones retained from 1883,and the Penal Code had been gradually updated,and not particularly due to any jurisprudence of the Mixed Courts.Well before the closure of the Mixed Courts Abdel Razzaq Ahmed Al-Sanhouri Pasha was appointed as chairman of the Committee set up to draft a new Civil Code.He was assisted by many Egyptian jurists,and also by E Lambert,the French jurist. The result of this work was the 1949 Egyptian Civil Code,of 1149 Articles[3].The background to this eclectic and monumental work has already been described by Sanhouri himself,and by various other learned writers[4].It is clear that the 1949 Code was solidly based on a mixture of the previous Mixed and Native Codes,together with Egyptian jurisprudence,the Sharia, and various foreign codes from nearly 20 countries,including Poland and Roumania.However,the code was specifically drafted with the Sharia in mind so that non-Islamic provisions were not inconsistent with it.This reflected Sanhouri's desire to preserve and use the spiritual heritage of Islam.

Article 1,paragraph 2,reads as follows:
A défaut d'une disposition législative applicable,le juge statuera d'après la coutume,et,à son défaut,d'après les principes du droit musulman.A défaut de ces principes,le juge aura recours au droit naturel at aux règles de l'équité.[5]
Thus it may be seen that the custom of the country was upheld as a source of law,and natural law and equity,a major basis of Mixed Court jurisprudence,were both expressly included.In recent years however the overriding factor has been Islamic law,and this is now enshrined in the 1971 Constitution,as amended.The Sharia is the principal source of legislation[6], and thus it follows that a more 'Islamic' interpretation of

the law will be in evidence.The Mixed Courts interpreted their Codes in an Egyptian manner;the difference now is that an Islamic view,rather than simply an Egyptian one,will be taken,even though it can be argued that as the quality and confidence of the Egyptian judiciary grew in the years to 1949 the type of natural law and equity which was applied in the Mixed Courts was likely to be a blend of Moslem and Christian principles that eventually became more Moslem than Christian.The judges were not,as has been discussed,simply technicians,but interpreted rules,customs,and laws to give justice in Egypt.A vital process was therefore the deliberations of the judges before judgement,and the outcome was likely to be less un-Islamic as time went on.In any event,the 1949 Code confirmed or reestablished the Islamic viewpoint,and can be seen as influenced by the Mixed Courts jurisprudence only indirectly.A further investigation must be made for a more fundamental contribution.

It is therefore important to review the historical placement and status of the Mixed Courts.They were established in 1875 to reform a chaotic situation,and began a unity in jurisdiction and legislation.Their immediate effect was to make the Capitulatory Regime in Egypt less intolerable, because their establishment cured many ills,and stopped the fraudulent pursuit of claims by foreigners against the Egyptian Government and other public Egyptian organisations.

A step forward in the unity of jurisdiction was the establishment of the Native Courts in 1883,using codes based on the Mixed Codes,and it must again be emphasised that the Native Courts and the Mixed Courts were national Egyptian courts.On their merger they became the National Courts,and the increasing use of the term National from 1937 onwards when referring to the Native Courts can only be seen as a reflection of impatience to see the new system operating.

Thus,giving justice in the name of Egypt,the Mixed Courts were Egyptian courts,and entitled to be regarded as such. Their codes were Egyptian codes and,together with the precedent that arose,were applied as Egyptian law to be used in the forum set aside for 'mixed' disputes.There was a continuous creation,evolution,and progress in the law so that

judgements were by no means restricted to simple interpretation of the relevant codes.The rules that became established were based on the needs of particular disputes,and judgements were consequently oriented towards the litigant.The question was, could the law help the parties and not,could the parties fit in with the written codes or existing law?This gave an impetus to utilise the system.People were no longer afraid of litigation,and the foremost principle of the rule of law,that no-one, not even the ruler,was above the law was an almost unbelievably radical change for Egypt in the 1870s.

It is true to say that foreign influence,and diplomatic and political claims against the Egyptian Government,gave unscrupulous foreigners rights quite inconsistent with natural justice and equity.However,the establishment of the Mixed Courts not only reduced foreign abuse of the Egyptian system,it also,as can be seen from Khedive Ismail's removal from power in 1879,reduced the Egyptian sovereign's scope for arbitrary imposition of his will.Egypt before 1875 was a battleground of powerful forces.Foreign power was often exercised at the expense of Egyptian sovereignty,but the more powerful Egyptians and Turks often exercised their power against the less powerful. All this changed after 1875,as order grew from disorder and legal confidence was established.The Mixed Courts imposed the rule of law and thus began the transition of Egypt from a feudal and backward country into a modern and structured state, with a legal climate conducive to commercial and social progress. If the Mixed Courts achieved nothing more,this much is worthy of the highest praise.How was it gained?

First,justice depended on the merits of the case and not on the power of the litigant.Whoever came before the Mixed Courts was treated as a litigant only,regardless of their wealth and position,or power.Secondly,the judiciary could not be pressured or induced into a particular decision,whether directly or indirectly.Judges were honest,and there was equality before the law.Cases were decided for reasons explained,often in unnecessary detail,in the judgement,which was given in open court after the proper procedures and the due hearing of evidence from both sides.The losing party knew why he had lost,and thus did not hold the tribunal in contempt,even though he may have strongly disagreed with the result.The

nationality of a judge rarely mattered;his loyalty was to the Mixed Courts and to the law.

Thirdly,the Bar and personnel were basically honest and diligent,well trained and competent.They had a sense of mission rare in Egypt in the 19th. Century,and regarded with pride the administration of justice as a duty.The efficient keeping of records enabled precedent to be established and used,and the juridiction gracieuse was a bonus in popular esteem as ordinary citizens realised that deeds and legal documents could be validated without difficulty for an agreed and official fee.

Fourthly,whatever base the codes of 1875 had,they were interpreted by judges employed by Egypt,in an Egyptian context. A system of precedent on English Common Law lines built up, and cases were followed,distinguished or overruled[7].The law thus developed to fill the gaps in the 1875 Codes that Egypt's transition into a 20th. Century state made evident. Precedent was easily accepted in Egypt because custom and usage were generally accepted,and the judiciary had four sources of law:the Mixed Codes,precedent,custom,and natural law and equity-all of which combined to make up a continuously developing Egyptian law in the Mixed Courts,establishing and maintaining a firm legal base for commerce and industry,as well as ordinary dispute settlement.An important attitude was the search for the object and intent of written enactments,so as to seek a purpose and a spirit rather than merely regard the letter of the legislation.The difficulty of passing laws applicable to foreigners without complicated agreements,before 1937,ensured that judge made law played the primary role in regulating areas of need.This was especially so because of the publicity given to Mixed Court decisions in the general and legal press.Also,once a case was within the courts the inherent jurisdiction of the judges was complete,without any restriction on their power except the General and Judicial Rules.

Fifthly,a litigant did not need to found his case on an established rule.He could seek redress on the grounds that it would be unjust to deny him a remedy,based on the concepts of natural law and equity,and this therefore established a simple rule.Conduct unreasonable and unfair was more likely

than not to result in a law suit,however powerful the defendant, so that the moral and social influence of the Mixed Courts was immense.For example,accidents to workers began to increase, and the Mixed Courts responded by developing an appropriate legal remedy.The same had happened with the improper use of patents,trademarks and designs,and theories to regulate new areas,for instance hire-purchase,arose as quickly as the problems that needed a solution,as has been discussed in the previous chapters.The absence of a written law was no bar. In this way the Mixed Courts did not impose unacceptable rules of behaviour on Egyptian society.Rather,the law was respected because the rights of the individual were protected, and people 'knew' the law in the sense that law closely reflected informed and educated moral values,not only of the foreign communities but also of Moslem and Christian Egyptians. Mixed Court law was effective because it was in broad sympathy with the fusion of modern and traditional values that represented Egypt.The 1875 Codes were only a framework which the judges between then and 1949 adapted to their own use,together with other codes and laws as they were promulgated.The law in use in the Mixed Courts was therefore essentially Egyptian law, not a pale shadow of foreign law received from abroad,despite of course the open and voluntary acceptance of much foreign legal theory,and the practice of retaining leading European lawyers on very important cases.

Thus one of the reasons the judgements of the Mixed Courts were respected and trusted was that they were not seen by Egyptians as foreign law,although by 1937 the institution itself was seen,with some justification,as anachronistic and unnecessary.In a slow and gradual way the consensus of Egyptian opinion shifted from favour to abolition,although not to disfavour.From the point of view of the foreign residents of Egypt,the Mixed Courts still had enough familiar principles,whatever their titles,to retain the confidence of the foreign community.

It is also worth considering that an efficient system of law and enforcement obviated any necessity for self help.Egypt is a notoriously litigious country.Was it not to the constant benefit of her inhabitants from 1875 that a proper channel of

dispute settlement existed between foreigners,and between foreigners and natives,rather than forcing the remedy or frustration of self help?

All in all,a feeling of confidence in,and the fairness of, the Mixed Courts existed.Parties felt that disputes could and should be left to settlement by the courts,even if they did not know the specific legal term of what was claimed.They became conscious,nevertheless,of having certain loosely defined rights.Here too the practice of free legal aid meant that noone was denied justice through an inability to pay. Further,enforcement meant an absence of futile and empty judgements,so that litigants could see that redress was available and real.

Apart from the day to day litigation,the cases of international importance concerning,for example,the Khedive's debts,the Dongola expedition,the Suez Canal Company,the Ottoman Bank, the Turkish Tribute Affair,the Salem Claim,and jurisdiction over foreign armed forces,all assisted the creation of Egyptian law on what might be called a higher level.Rarely can a national court have had the opportunity to deal with such importance cases,especially knowing that enforcement of the judgement would be carried out,if not by Egypt herself then by her ally Great Britain,although this latter course was in fact unnecessary.All the cases went to show a rule of law, regardless of the litigants.

It was inevitable,however,that this liberal amalgam of sources of law could not last forever.As Egypt gained political freedom,and created modern sophisticated institutions capable of drafting legislation and enacting rules and regulations,the need to continue the Mixed Courts became less and less obvious. Nevertheless,respect for the rule of law remained,until reduced by the use of the courts as part of the social reforms of Egypt after 1956.

The Mixed Courts had only lasted for 74 years,an insignificant period of time in comparison to Egyptian history,but covering years of profound change in Egypt,and often initiating or facilitating such change.1949 saw the penultimate step in providing Egypt with a unified and modernised system of law, definitely Egyptian but clearly Western influenced.

It is therefore useful to note events since 1949.On July 23rd. 1952 King Farouk abdicated in favour of his infant son Fuad.Control of Egypt was vested in a Regency Council, and gradual moves were made towards a Republic,formally established on June 18th. 1953.The legislative process was used to enact socialist laws,with the aim of redistributing wealth and landThe pace of these reforms accelerated after the Suez Canal affair of 1956,and was equally hard on foreigners,whether they owned moveable or immoveable property, and on the Egyptian upper and middle classes.Political control of decision makers,such as judges,was widely feared,and individual participation in commerce and trade was severely restricted.The public sector grew at the expense of the private,and lawyers and judges almost became mere legal technicians,rather than fully independent and free thinking professionals[8].

Thus the free thinking legal profession,so much in the fore of the Mixed Courts,and to a lesser extent in the Native Courts, was eclipsed by the political changes after 1952.The state was master of an overall plan for Egypt which relegated the law to its service in the interests of socialist reform.The result was that the important independent judicial and professional tradition fostered and encouraged by the Mixed Courts became largely unattainable in practice,although adhered to as a worthwhile ideal.The law as a profession ceased to provide the leaders of society,and this function passed to the military.In the past,Egyptian lawyers had been foremost amongst the politicians and decision makers,and several Prime Ministers had practised law.Judges in the Native Courts frequently became Government Ministers(a position denied to Mixed Court judges as a matter of Mixed Court policy),and the world of literature was liberally endowed with legally trained authors,journalists,and critics.All of them had been influenced in some way by the commercial and legal reasoning of the Mixed Courts,who drew on modern and enlightened thinking from within and outside Egypt,and disseminated it in their judgements.

The restrictions in the 1950s in Egypt did not apply outside. As the Arab countries generally sought to modernise their laws it was natural for them to turn to Egypt for a model,and to

Egyptian lawyers and judges,who went in great numbers to the Arabian Gulf and elsewhere to practise their professions. Indeed,just as many non-Egyptian lawyers worked in Egypt from 1875 to 1949,so too did foreign,albeit Arab,lawyers work in the Gulf.The tradition of a profession drawn from different backgrounds was as acceptable in the Gulf as it had been in Egypt,because there was a need to be satisfied. Doubtless when the Gulf countries have further developed their own legal systems they will rely less on Egyptian personnel and laws,although Egypt's cultural and literary position will maintain her legal influence[9].

Indirectly,therefore,the influence of the Mixed Courts is diffused in other countries,by their acceptance of the amalgam of Islamic and modern law which was developed and practised in Egypt.

Domestic renewal of the influence of the Mixed Courts began after the death of President Nasser and the accession to power of President Sadat.The predominance of state ownership was lessened,and many of the restrictions on business,financial and industrial life were reduced.The importance of commerce was reestablished,and the law once more began to be used popularly as a means to settle disputes.In the Nasserist era this had been less necessary because state ownership entailed state control of disputes and their resolution.In addition,a parallel system of courts and tribunals was established to deal with such disputes with government owned institutions. After 1971 the ordinary law courts reaffirmed their role in commercial matters,although many other disputes remained within the jurisdiction of state security courts,or constitutional tribunals.Thus the Mixed Courts jurisprudence,which had been unnecessary as a source in the scheme of policies of President Nasser(although no part of his policies were specifically aimed against the Mixed Courts),began to be a source again in the resolution of commercial disputes.Lawyers and judges needed to refer back to old jurisprudence,but there was still little evidence of the direct influence of the Mixed Courts.Why was this so?

Once Sanhouri had included the better parts of Mixed Court jurisprudence in the 1949 Civil Code,the written law thus set

out would from then on be interpreted by judges and lawyers increasingly unfamiliar with the jurisprudence,largely in French and Italian,of the old courts.Law students providing future generations of lawyers and judges would not be taught the old jurisprudence,and even for those codes still dating back to 1883,and thus based on the 1875 Mixed Codes,the French and Italian reference works were inaccessible because of the language.Basically,the Mixed Courts are only talked of in a brief historical context,if at all,in much the same way as the Common Law which was codified into,for instance,the 1893 Sale of Goods Act in England is rarely directly referred to.It was,and is,only at the highest levels of the law that the decisions of the Mixed Courts help to explain and elucidate points,and then only in the absence of specific laws or Islamic provisions.

Even the rich jurisprudence on trademarks and patents had suffered codification,so that it was less necessary to refer to the old cases[10].Effectively,the only areas of law where the Mixed Courts jurisprudence plays a part are in the commercial and maritime fields.The 1883 Commercial Code,based on the 1875 Mixed Commercial Code,draws heavily on Mixed Court jurisprudence for its effective use,although by now commentaries are in Arabic and refer to recent decisions more than old ones. In addition,the practice of arbitration continues,although in a different form from that seen before because of changes in procedure.

On the whole,with each new law or political decision,the influence of the Mixed Courts in any recognisable sense lessens. What,however,of the influence on the judges?

The years after 1952 were difficult ones for the judiciary. The independence and impartiality of judges,a vital element in the Mixed Courts,had been set out in the 1943 law on the Independence of the Judiciary,thus codifying the principles previously accepted.After the Nasserist era such principles were again set out in Article 165 of the 1971 Egyptian Constitution.Thus it may be said that the Mixed Court practice in this area also became codified and divorced from its roots. Although judges may have at first felt a link with the attitudes of the judges of the Mixed Courts,their position

was regulated by a specific law to which they were to refer[11].

It must,therefore,be on an altogether different level from direct influence that the contribution of the Mixed Courts is confirmed.Clearly,in their influence on the Native Courts they indirectly added to their own contribution,and this influence was present from the start of the Native Courts in 1883.It continued despite the appointment of John Scott,a former judge of the Mixed Court of Appeal,as Judicial Adviser to the Egyptian Government in 1890,with the aim of making the Native Courts more in tune with the English Common Law, although many changes were made in the Native Courts,which were under Egyptian Government and English Adviser control[12]. The differences in civil law were not radical,nor fundamental. Despite this,it must be on the level of the rule of law, discussed above,that the influence and contribution of the Mixed Courts must be assessed,together with their example of, and work towards,a gradually increasing unity of jurisdiction.

The years 1926 to 1937 were years of great change.As the period drew to a close the final chapter in the history of the Mixed Courts began.In the 1920s they had seemed set to endure forever,but by the 1930s rapid and radical political change had sounded a warning note so that the Montreux Convention,sudden as it was,had an almost fatalistic air about it.In many ways the Mixed Courts had themselves encouraged the critical analysis,close reasoning,and scholarly research that had led to an educated elite of lawyers in Egypt.It was very much those trained in law who were at the front of nationalism,and in a way the Mixed Courts can be said to have encouraged the very freedom of thought,independence of action,and respect for a national and sovereign rule of law which fostered much of the moderate nationalist opinion calling for their abolition.In any event,by 1937 the merger of the Mixed Courts was agreed,by 1949 it was taking place, and the momentum of change swept along the religious personal status courts in 1956,when the latter were abolished and their jurisdiction transferred to the new National Courts[13].

In essence,this was the true culmination of the 1875 reforms. From the beginnings of the Mixed Courts in 1875,to the Native Courts in 1883,and the Montreux Convention reforms in 1937,

the various jurisdictions of the Egyptian legal system drew closer together,while at the same time foreign consular jurisdiction lessened.Finally,the whole of Egypt's legal system became unified in 1956.There can be no doubt that the Mixed Courts paved the way for this to happen by the gradual cycle of reform,development and reform.The fusion of the Mixed and Native Courts provided an up to date and solid system with which the personal status courts could join,after their own gradual internal reforms over the years[14].

Thus it may be stated that the Mixed Courts established the rule of law in Egypt,developed a truly Egyptian court system, and were the base on which the post-war Egyptian legal system rests.Their direct influence has waned and receded,but without their existence and work between 1875 and 1949,and without their conscientious and dedicated development and operation, the Egyptian legal system after the 2nd.World War and until the present day would be quite different.

Notes to Chapter 10.

1.Most of this modern description has been based on personal observation,but the present day court system in Egypt,including other courts outside the main legal hierarchy, is usefully outlined in Hill,Mahkama! Studies in the Egyptian Legal System, 1979,London,Ithaca Press,pp.1-77.

2.This brief note could not do credit to all those connected with the Mixed Courts who continued to contribute to Egypt-Abdel Hamid Badawi,for instance,the architect of the Egyptian presence at Montreux,became a Judge at the International Court of Justice at The Hague;nor could it adequately mention those foreign judges who went on to positions of importance in their own countries:see,e.g.,lists of judges in Brinton,op. cit.,p.228-p.231,& Brinton,The Closing of the Mixed Courts of Egypt,AJIL,1950,vol.44,p.303.

3.Law no.131 16.7.1948,operative 15.10.1949;the MCC had 774, and the Native Civil Code had had 641,Articles.

4.see e.g. Sanhouri,al Wasit fi Sharh al-Qanoun al-Madani,1963-1970,Cairo,vols.1-10;Coulson,op.cit.,p.153/4;Anderson in Holt, op.cit.,pp.228-230;Ziadeh,op.cit.,pp.14-20;Morcos & Farag,Le Nouveau Code Civil Egyptien,Al Qanoun Wal Iqtisad,1952,vol. 22,p.249;Chehata,L'Influence du Code Civil Français en Egypte et le Nouveau Code Civil Egyptien,Al Qanoun Wal Iqtisad,1951, vol.21,p.415;Ziadeh,Property Law in Egypt,AJCL,1978,vol.26, p.249;for a denial that Western style codes existed in Egypt before 1949 see Forte,Egyptian Land Law:An Evaluation,AJCL, 1978,vol.26,p.273(in fact the 1949 Code was more Islamic than the 1875 or 1883 Codes,regardless of the obvious error in Forte's article).For the broad benefits of the Mixed Court background see,inter alia,Holt,op.cit.,p.216;Brinton,op.cit., pp.211-213;Liebesny,The Law of the Near & Middle East,1975, Albany State,Univ.of New York Press,p.71 et seq.

5.Official French translation by Adib Maakad bey and Maître Umberto Pace,issued in Cairo in 1949.Maakad & Pace also drew up a set of comparative tables of the old Mixed & Native Codes with the new Civil Code.

6.Constitution of 11.9.1971,proposed by Pres.Sadat,and amended 22.5.1980 following a referendum.

7.Quite contrary to French practice,e.g.Art.5,French Civil Code.

8.See also Ziadeh,Lawyers,the Rule of Law & Liberalism in Modern Egypt,1968,Standford,pp.135-147.
9.For a general and experienced view of the spread of Egyptian influence in Arabia see Ballantyne,Legal Development in Arabia,1980,London,Graham & Trotman,generally;Dr.Gamal Moursi Badr,Unification of Laws,ESIL,1955,vol.11,p.115.
10.Law no.57 1939 on trademarks;Law no.132 1949 on patents and industrial design;Law no.354 1954 on copyright.
11.Ironically,one of the few direct links between the modern judiciary and the old Mixed Courts is the salary paid to ordinary judges,which has hardly increased since 1949.
12.Saroufim,op.cit.generally,where the exact influence of Great Britain has been examined in detail.
13.Law no. 462,1955, from 1.1.1956;this involved Sharia as well as non-Moslem courts.
14.e.g.Law no.25 of 1920,and Law no.25 of 1929,on family law;Law no.78 1931,instituting a code of procedure for Sharia courts;Law no.77 1943 & Law no.71 1946,regulating testimentary dispositions;Law no.180 1952,abolishing private (i.e. family)wakfs.

Appendix I

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Appendix II

GAZETTE DES TRIBUNAUX MIXTES (GTM)
Table of Volumes and Years.Each volume covers a period from November to October.

Volume.	Years.	Volume.	Years.
I	1910-11	XXI	1930-31
II	1911-12	XXII	1931-32
III	1912-13	XXIII	1932-33
IV	1913-14	XXIV	1933-34
V	1914-15	XXV	1934-35
VI	1915-16	XXVI	1935-36
VII	1916-17	XXVII	1936-37
VIII	1917-18	XXVIII	1937-38
IX	1918-19	XXIX	1938-39
X	1919-20	XXX	1939-40
XI	1920-21	XXXI	1940-41
XII	1921-22	XXXII	1941-42
XIII	1922-23	XXXIII	1942-43
XIV	1923-24	XXXIV	1943-44
XV	1924-25	XXXV	1944-45
XVI	1925-26	XXXVI	1945-46
XVII	1926-27	XXXVII	1946-47
XVIII	1927-28	XXXVIII	1947-48
XIX	1928-29	XXXIX	1948-49
XX	1929-30		

BULLETIN DE LEGISLATION ET DE JURISPRUDENCE EGYPTIENNES (BLJ)
Table of Volumes and Years.Each volume covers the Judicial year from October.

Volume.	Years.	Volume.	Years.
I	(1888-)1889	XXXII	1919-20
II	1889-90	XXXIII	1920-21
III	1890-91	XXXIV	1921-22
IV	1891-92	XXXV	1922-23
V	1892-93	XXXVI	1923-24
VI	1893-94	XXXVII	1924-25
VII	1894-95	XXXVIII	1925-26
VIII	1895-96	XXXIX	1926-27
IX	1896-97	XL	1927-28
X	1897-98	XLI	1928-29
XI	1898-99	XLII	1929-30
XII	1899-1900	XLIII	1930-31
XIII	1900-01	XLIV	1931-32
XIV	1901-02	XLV	1932-33
XV	1902-03	XLVI	1933-34
XVI	1903-04	XLVII	1934-35
XVII	1904-05	XLVIII	1935-36
XVIII	1905-06	XLIX	1936-37
XIX	1906-07	L	1937-38
XX	1907-08	LI	1938-39
XXI	1908-09	LII	1939-40
XXII	1909-10	LIII	1940-41
XXIII	1910-11	LIV	1941-42
XXIV	1911-12	LV	1942-43
XXV	1912-13	LVI	1943-44
XXVI	1913-14	LVII	1944-45
XXVII	1914-15	LVIII	1945-46
XXVIII	1915-16	LIX	1946-47
XXIX	1916-17	LX	1947-48
XXX	1917-18	LXI	1948-49
XXXI	1918-19		

Appendix III.

Selected glossary of Egyptian Arabic words.

ariyya	loan.
Daira Sanieh	Upper Egyptian Estates of the Khedive.
fatwa	legal opinion.
feddan	1.04 acres.
fellahin	agricultural peasants.
firman	charter or agreement.
ghabn fahish	grave deception.
ghaffir	watchman.
khiya	option(of inspection of goods).
manfa'a	proceeds of a trust,usufruct.
meglis	administrative courts(council).
milla	personal status(religious)courts for non-moslems.
moudir(mudir)	provincial governor.
moudirieh	governorate.
nazir	custodian of trust property.
rahn	pledge.
rokhsa	permit/licence.
sharia	Islamic law.
shufa	preemption.
wakf	form of trust over property,usually for charitable purposes.
wasiyya	legacy.

Appendix IV

Income and expenditure for the Mixed Courts 1875 to 1926.

Year	Income(LE)	Expenditure(LE)
1876	37,979	71,923
1877	61,541	96,382
1878	115,760	114,022
1879	113,205	120,307
1880	176,713	151,685
1881	155,298	127,496
1882	111,466	132,300
1883	202,591	141,366
1884	200,361	141,389
1885	167,676	143,398
1886	170,613	144,480
1887	176,027	146,988
1888	169,828	134,010
1889	190,514	137,639
1890	208,845	139,170
1891	249,253	142,788
1892	215,251	139,645
1893	247,198	137,937
1894	271,365	140,599
1895	269,373	142,699
1896	298,446	151,345
1897	330,563	148,852
1898	372,108	151,273
1899	446,517	156,591
1900	473,014	155,373
1901	520,724	157,665
1902	562,865	161,709
1903	678,278	167,141
1904	762,663	173,612
1905	1,007,231	213,426
1906	1,029,463	236,141
1907	1,023,998	240,489
1908	793,038	240,324
1909	842,694	244,728

1910	864,145	265,762
1911	914,697	275,222
1912	1,167,354	304,844
1913	1,028,103	306,833
1914*	1,046,799	403,380
1915-16	787,433	298,406
1916-17	909,312	294,397
1917-18	1,107,262	287,049
1918-19	1,096,063	313,969
1919-20	1,453,764	394,092
1920-21	1,175,474	478,955
1921-22	1,156,728	412,285
1922-23	1,220,312	397,218
1923-24	1,607,865	446,425
1924-25	1,077,764	394,560
1925-26		
Total	29,265,534	10,518,289
Surplus		18,747,245

*From the 31st.March 1914 the accounts of the Mixed Courts were drawn up on a financial year basis;these figures are taken from the Livre D'Or,1926,pp.179 and 180.

Appendix V

The Employees' Mutual Fund.

As a measure of the solidarity and harmony of all the nationals who worked in the Mixed Courts as fonctionnaires,it must be recorded that a highly successful mutual association was founded in 1927,by Adib Maakad bey,sometime Greffier en chef of the Alexandria District Court,later Greffier en Chef of the Mixed Court of Appeal,and brother of Wadih Maakad,the last Inspecteur en Chef des Greffes des Juridictions Mixtes.This association celebrated its 10th.anniversary in 1937,and was designed to organise a fund for the benefit of employees,and to look after their welfare if they were members.Its success was assured by wise investment in pension funds,rest homes and medical facilities,and the fund was greatly increased by donations from the Bar and judiciary,who knew only too well that the success of the Mixed Courts itself was made possible by the highly efficient and extremely honest administrative system that allowed the judiciary and the Bar to function at their best.

A lavish commemorative volume was issued in 1937[1],recording the work of the fund and the appreciation of the judiciary for the employees' work.The fund was an essential element in providing long term security for the employees,and was fortuitously timed so that the Montreux Convention reforms and the eventual closure of the Mixed Courts did not prove to be as damaging financially to the employees as it was to many advocates.It is hard to overestimate the reputation of the various administrative departments of the Mixed Courts, but the commemorative volume is full of praise from the highest judicial quarters,and bears testimony to the well organised system that was used as a base for the new National Courts.In this area too the Mixed Courts were innovators,and the employees' fund was the forerunner of many similar schemes in other organisations.

1.Livre Commemoratif du Décennaire de la Caisse de Prévoyance du Personnel des Juridictions Mixtes d'Alexandrie,1937,Alex.